Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SYLVIA EVANS, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

BERTHA BALARK, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER EVANS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) IF THE SEVENTH CIRCUIT DECISION COMPLETELY REJECTS THE CONTRACTUAL BASIS OF CONSENT DECREES INVOLVING GOVERNMENTAL ENTITIES, IS THIS CONSISTENT WITH SUPREME COURT STANDARDS FOR MODIFYING CONSENT DECREES.

(2) IS PLEADING AND PROOF OF HARDSHIP NECESSARY BY A PARTY SEEKING MODIFICATION OF A CONSENT DECREE EVEN AFTER INITIAL PROOF OF A CHANGE IN THE RELEVANT LAW.

(3) DOES THE SEVENTH CIRCUIT DECISION EFFECTIVELY ELIMINATE STATE LAW PENDENT JURISDICTION CLAIMS FROM THE PROTECTION OF FEDERAL CONSENT DECREES.

(4) DOES THE SEVENTH CIRCUIT DECISION IN FAILING TO REQUIRE TAILORING OF PROPOSED MODIFICATION OF A CONSENT DECREE TO A CHANGE IN THE RELEVANT LAW MEET STANDARDS FOR MODIFYING CONSENT DECREES.

(5) DOES THE SEVENTH CIRCUIT DECISION VIOLATE THE STANDARD THAT MODIFICATION OF CONSENT DECREES NEED NOT CONFORM TO A FEDERAL CONSTITUTIONAL FLOOR.

(6) WHERE THE STANDARD FOR APPELLATE REVIEW IS FOR ABUSE OF DISCRETION, MAY THE REVIEWING COURT MAKE ITS OWN FINDINGS OF FACT DE NOVO.

PARTIES TO THE PROCEEDINGS

Petitioner, SYLVIA EVANS, was a Plaintiff before the United States District Court for the Northern District of Illinois and was appointed as representative of a class which was certified by the Court.

In the United States Court of Appeals for the Seventh Circuit, SYLVIA EVANS was an appellee.

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Sylvia Evans ("Evans") respectfully petitions for issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

There are three separate opinions in *Evans v. City of Chicago*. They are reported at 689 F.2d 1286 (7th Cir. 1982) (App. 108); 873 F.2d 1007 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 2650 (1990) (App. 72); and 995 F.2d 1393 (7th Cir. 1993) (App. 1). The opinions in the trial court on October 22, 1987 and on July 25, 1991, are not reported in Federal Supplement, and appear at App. 143 and at App. 52.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 24, 1993, after rehearing en banc. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

1. Section 1983 of the Federal Civil Rights Act, 42 U.S.C. § 1983 (see Addendum).

2. Rule 60 of the Federal Rules of Civil Procedure (see Addendum).

STATEMENT OF THE CASE

There are three Seventh Circuit opinions in this litigation. For convenience sake, these are referred to as *Evans I* (1982); *Evans II* (1989) and *Evans III* (1993). Copies of the opinions are reproduced in the Appendix to the Petition.

In *Evans I*, the Plaintiff classes attacked CHICAGO's methods of paying judgment creditors in tort cases. Every settlement in a tort case against CHICAGO is reduced to a judgment, just as is any final tort judgment against CHICAGO which is not subject to further appeal. CHICAGO paid tort judgments of $1,000.00 or less as soon as the judgment holders presented proper documents. All judgments over $1,000.00 were recorded in the CHICAGO Comptroller's "Judgment Record" and then paid in chronological order, by date of entry of each judgment. Since CHICAGO deliberately did not appropriate sufficient monies each year to pay the outstanding judgments, the waiting period for tort judgment creditors reached 47 months in 1979. As a result, most of the over-$1000 judgment holders sold their judgments at discounts which reached 20 percent. The *Evans I* opinion describes the plaintiff classes and sums up CHICAGO's practices in paying tort judgments. (App. 111-112)

The *Evans I* plaintiff classes asserted federal due process and equal protection claims, and also claims under the Illinois Constitution and Illinois statutes. Section 9-104(a) of Chapter 85 of the Illinois Revised Statutes was challenged on the basis of procedural due process, but the trial court did not reach this issue. The trial court did hold that Section 9-104(b) of the Illinois statute violated federal due process. On this point, the Seventh Circuit held that plaintiffs had no standing to attack this part of the statute because CHICAGO had never invoked the installment payment plan provided for therein. The trial court had also ruled that the practice of CHICAGO in prioritizing payment of the under-$1000 tort judgments in preference to the over-$1000 judgments was a violation of federal equal protection. The Seventh Circuit affirmed this ruling, one Justice dissenting on the basis that both provisions of the Illinois statute were squarely before the court and that he would find both unconstitutional.

The majority expressed no opinion about the constitutionality of Section 9-104.

The parties thereafter entered into a consent decree on May 31, 1984. The decree described what was being compromised:

> PURPOSES OF CONSENT DECREE
>
> 1. The parties state that they are entering into this Consent Decree for the purpose of avoiding the further expense of protracted litigation over the matters resolved and decided by this Consent Decree. The parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspects of plaintiffs' class complaint, reserving only plaintiffs' claims or damages and claims for attorneys' fees. All equitable and legal rights of the plaintiffs are merged into this Consent Decree unless otherwise specified * * *.
>
> 4. The parties hereto expressly reserve their respective rights to fully assert and defend against any claim or claims to damages and attorney's fees arising out of the policies or practices alleged to have violated Plaintiffs' rights in this matter. (App. 99-100)
>
> TERMS OF SETTLEMENT
>
> 3. Plaintiff's understand, upon advice of counsel, and agree that except as otherwise provided herein, this Decree is a final and total settlement of all claims they now have or may have in the future, arising either directly or indirectly out of or related to Ill. Rev. Stat. 1981, ch. 85 §9-104 and Ill. Rev. Stat. 1981, ch. 24 §8-1-16, as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees, as hereinafter specified; and that such finality is applicable to the defendants, the City of Chicago, and its officers, agents and employees. (App. 101)

CHICAGO retained full rights to contest damages. The parties waived trial by jury. A formula was spelled out for making future appropriations for tort judgment pay-

ments in order to ensure there would be adequate funds available for payment. (App. 103-106) Specifications were laid down for processing judgments for payment. (App. 102) CHICAGO was required to submit detailed reports for years 1984 through 1987. (App. 106) Jurisdiction was retained by the court to enforce or modify provisions of the decree, including reporting. (App. 107)

A bench trial was held in 1989. The parties had entered into a Stipulation for purposes of the trial. According to the Stipulation, the trial court was to decide only two questions relative to damages, although CHICAGO continued to insist that there should be no damages. The first question was whether there should be any damages awarded at all. The court decided this question "Yes." The second question was from what beginning date damages should be calculated for each judgment in the relevant time period. The court then chose one of the two alternative starting points agreed in the Stipulation. The damages then were to be automatically calculated from an agreed computerized program of all applicable judgments. Accordingly, there was no entry of judgment in any specific dollar amount.

The trial court's ruling and remarks after the trial on damages centered on the "customary and routine practices" of CHICAGO as follows:

> * * * First, the City did not pay such judgments within the year the judgment was entered. Secondly, the City did not pay such judgments in the ensuing year. Thirdly, the City did not pay those judgments in 10 annual installments. Fourthly, the City did not pay such judgments in accordance with any state statute. Fifth, the City did not pay those judgments in accordance with its own ordinance, Ordinance 7-29, which required that they be paid in order of entry. And sixth, the City made no attempt to budget enough money to pay judgments over $1,000 in accordance with the time limits established by statute or its own ordinance.

> In short, with respect to judgments over $1,000, it was the custom and practice of the City simply to ignore the requirements of law with regard to when those judgments should have been paid. (App. 148-149)
>
> * * * * *
>
> * * * It seems to me that the practices of the City may well be or have been, because we are speaking in the past tense here, a violation of both procedural and substantive due process. The argument for a violation of procedural due process is that the City followed no process at all. There simply was no procedure other than a consistent and intentional disregard of the procedure that was clearly established by law. * * *
>
> It seems to me, therefore, that the practice of the City probably violated the due process rights of the plaintiffs. I emphasize that I am talking about the practice of the City because I need not reach even by way of discussion the question of whether the procedure specified in Section 9-104(a) comports with due process. The reason I need not reach that question is that the City never made any effort whatsoever to comply with that statute. It simply isn't involved in this case. * * * (App. 149-150)

The trial court further stated more emphatically that it did not reach the issues of procedural and substantive due process on the basis that the equal protection holding in *Evans I* is the "law of the case." (App. 150-156)

CHICAGO appealed from the award of damages. In *Evans II* (App. 72) the Seventh Circuit ruled that the actions of plaintiff's counsel at trial had reopened the equal protection issue; that the holding in *Evans I* that there was a federal equal protection violation was plain error; and that the plaintiff's failure to cross-appeal on the trial court's declination to expressly rule on the procedural and substantive due process issues meant that those issues were no longer part of the case. In this latter respect,

the Seventh Circuit in *Evans II* at footnote 11 said that the due process issue ". . . was not argued by the parties on this appeal (App. 80-81) and at footnote 15 stated: "The due process claim has not survived to this stage of the litigation." (App. 92) Plaintiffs had not appealed from the refusal of the trial court to reach the due process issues.

Thereafter, CHICAGO filed a petition to vacate the consent decree in its entirety. The petition was brought pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, that a "prior judgment upon which it is based has been reversed or otherwise vacated, where it is no longer equitable that the judgment should have prospective application . . ." CHICAGO argued that it came within both provisions of Rule 60(b)(5): the prior judgment upon which the Consent Decree is based has been overruled, and, secondly, because the prior judgment was overruled, it is no longer equitable that the consent judgment should have prospective application (App. 57). At no time did CHICAGO make any claim that adherence to the consent decree would cause severe unanticipated hardship.

In its oral ruling the trial court stated that the CITY's claim was that the trial court ". . . should be guided exclusively by the decisions in *Evans I*, *Evans II*, and the language of the consent decree itself. After considerable reflection, I have come to agree with that point of view." (App. 62) The trial court then quoted extensively from *United States v. Armour & Company*, 402 U.S. 673 (1971) and then stated:

> I find that language instructive in two respects. First, it admonishes us to construe the Decree within its four corners and not attempt to discern the probably opposing purposes of the parties when they entered into it. The second lesson we learn from the *Armour* case is that a party who has entered into a Consent

> Decree should be held to its bargain and should not be permitted to vary the Consent Decree or escape from its obligations while using some theory it chose not to litigate and chose, rather, to compromise.

The trial court further held that *EVANS II* did not reverse, vacate or overrule the due process claims which were otherwise settled in the consent decree, so that CHICAGO could not rely on this aspect of Rule 60(b)(5) to vacate the decree. Although CHICAGO claimed that *EVANS II* rejected the rational basis test which would underlie a due process inquiry, the court said:

> The City argues that Evans II can be read as rejecting the rational basis test that would be the underpinning of a due process claim just as much as it rejected that same test or, rather, found that the City's practices did not violate that test under the equal protection claim. It is true that in my decision in the damages trial, I observed that the rational basis test appeared to be relevant to both an equal protection and a due process analysis. And it may be that in light of Evans II the Seventh Circuit, if confronted with the due process questions today, would say that no violation of due process is involved because there is a rational basis for the City's practices of paying, for instance, contract judgments ahead of tort judgments, or personnel judgments ahead of judgments payable out of the tort judgment fund, and a rational basis for the failure to budget enough money to pay tort judgments within a reasonable time.
>
> The point is, I believe, that holding has not yet been made. (App. 61)

The trial court treated other equitable considerations as a separate avenue of relief under Rule 60 and held there were none adequate to justify vacation of the decree. (App. 61-65)

Thereafter, CHICAGO appealed. The panel decision was 2 to 1 in favor of plaintiffs. (App. 24) CHICAGO petitioned

for rehearing en banc, which was granted, and the decision after rehearing was 6 to 5 in favor of CHICAGO, (App. 1) from which plaintiffs appeal and seek certiorari.

REASONS FOR GRANTING THE PETITION

Statement Regarding Jurisdiction in the Lower Federal Courts

Plaintiff *Evans* contends that jurisdiction in the trial court was based on federal question jurisdiction, 28 U.S.C. §§ 1331 and 1343 (1988) involving a question under the Federal Civil Rights Act, 28 U.S.C. § 1983 (1988), and also was based on pendent jurisdiction with respect to claims asserted under the Illinois Constitution and statutes, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). In the United States Court of Appeals for the Seventh Circuit, jurisdiction was based on 28 U.S.C. §§ 1291 and 1292(a)(1) (1988).

I.

THIS COURT'S OPINION IN THE *RUFO* CASE IS MISINTERPRETED BY THE LOWER FEDERAL COURTS AND PARTICULARLY BY THE SEVENTH CIRCUIT AS A GREEN LIGHT TO VACATE CONSENT DECREES.

Evans III grossly misapplied the standards to be followed where one party to a federal consent decree seeks to vacate the decree.

This court's opinion in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. ____, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) has triggered a minor avalanche of petitions in the lower federal courts seeking to vacate consent decrees. What makes *Evans III* important is the correct statement by the dissent that the plurality opinion has

". . . put in grave doubt" the value of consent decree settlements with governmental entities. The dissent went further and stated that the decision ". . . effectively deprives state and local governments of the ability to enter into enforceable consent decrees." (App. 19) The plurality opinion propounds the radical legal doctrine that governmental entities are not able to enter into binding consent decrees: (App. 7-8)

> * * * . . . democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal; what one mayor decrees during his four-year term, another may revoke. * * * The current mayor wants to be free of his predecessor's commitment, concluding that more flexibility over budgets will promote the public welfare. People of good will could be on either side of this disagreement; each mayor may have correctly perceived the needs of the moment.

If this view is allowed to prevail, legal chaos will result. There is simply no question whatsoever but that counsel for opponents of state and local governments will shun consent decrees which, based on *Evans III*, are subject to the possibility of being reopened at the option of a settling defendant. If *Evans III* remains the law, settlement resolution of federal claims against all kinds of government entities will become an endangered species. At a minimum, the increasingly inexact interpretations of *Rufo* in the lower federal court are a positive invitation to any defendant already party to a consent decree to promptly begin the process seeking to elude it. Consequently, it is not unreasonable to expect that a clear majority of consent decree settlement defendants will be encouraged enough by the development of post-*Rufo* law to petition the federal courts for relief.

The *Evans* plaintiffs claim that *Evans III* is such a serious misapplication of the rule announced in *Rufo* that

this court must grant review in order to maintain proper supervision over the lower federal courts in vacating or modifying consent decrees.

Without question federal appeals courts are interpreting *Rufo* as permitting a wide and sweeping latitude for re-examining consent decrees for modification or vacation purposes. As examples: *In the Matter of Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) ("So now a court can modify an injunction whenever the principles of equity require it to do so."); *United States v. City of Miami*, 2 F.3d 1497, 1504-1505 (11th Cir. 1993) (termination of employment discrimination decree appropriated solely based on changed circumstances in achievement of purpose of decree); *United States v. City of Chicago*, 978 F.2d 325, 333 (7th Cir. 1992) (proof that a decree "functioned more like a judgment than a contract" permits modification); *Brotherhood of Midwest Guardians, Inc. v. City of Omaha*, 1993 WL 432769 (8th Cir. 1993) (affirmative action consent decrees are "not favored" unless they will terminate when manifest racial imbalances are eliminated); *Hesselbein v. Clinton*, 999 F.2d 320, 324-325 (8th Cir. 1993) (lack of clarity in enforcement provisions of decree allows the trial court to vacate the entire decree if necessary on remand). Recently a district court was presented with a modification request on the basis of bare conclusionary statements in an affidavit by a former prison administrator that ". . . the Division of Prisons had made a number of assumptions regarding the custody level and population requirements of the system . . ." and ". . . did not foresee the crisis we face today." *Small v. Hunt*, 1994 WL 9445 (E.D.N.C. 1994)

There is a growing body of law review comment espousing the view that *Rufo* is an undesirable development in the law of consent decrees. In Comment, *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV.L.REV. 163,

293 (1992) the author states: "By making the gains won in consent decrees extremely susceptible to erosion, the *Rufo* standard makes consent decrees less attractive." In Comment, *"Consent Decrees in Prison and Jail Reform—Relaxed Standard of Review for Government Motions to Modify Consent Decrees"*, 83 NORTHWESTERN L. SCHL. JRNL. OF CRIM. LAW & CRIMINOLOGY 1024, 1044 (1992) it is stated:

> While the flexible standard put forward in *Rufo* can be harmonized with the language in *Swift*, on its face the *Rufo* standard seems incompatible with the contractual "four corners" rule put forth by the Court in *United States v. Armour & Co.* and *Firefighters Local Union No. 1784 v. Stotts.*

Another similar viewpoint is found in Comment, *"Settling Through Consent Decree In Prison Reform Litigation: Exploring the Effects of Rufo v. Inmates of Suffolk County Jail"*, 34 BOSTON COLL.L.REV. 163, 196 (1992):

> "After *Rufo*, parties contemplating consent decrees as a means of settlement must proceed carefully, because the *Rufo* standard offers no guarantee that even their most basic expectations will be protected."

In a concurring opinion in *Rufo*, Justice O'Connor expressed concern whether the standard for modification elaborated in the opinion ". . . makes matters any clearer than the equally general language of Rule 60(b)(5)." (112 S.Ct. at 765). Two years later, the best tentative answer is that the standards in *Rufo* are set forth in a straightforward, explicit summary but the lower federal courts, as in *Evans III*, frequently are not following those standards in a manner that is congruent with what is stated in *Rufo*. *Evans III* is a prime example.

II.

THE PLURALITY IN *EVANS III* COMPLETELY REJECTS THE CONTRACT BASIS OF CONSENT DECREES.

Judge Easterbrook, the author of the plurality opinion in *Evans III* first sketched the outline of his developing theory in 1987 and acknowledged it was a minority view: "Ultimately, there is no good reason to allow consent decrees to exceed the authority the parties would have in the absence of litigation. This is a minority view so far." Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U.CHI.L. FORUM 19, 39 (1987) The author convinced the *Evans III* plurality to adopt the rather radical doctrine that governmental entities cannot be held to their consent decree bargains on a contractual theory. He states (App. 8):

> Governments are in this respect unlike corporations or other contracting parties. * * * But temporary officeholders may not contract away the basic powers of government to enact laws—or in this case to adopt budgets—in the same way natural persons may make enduring promises about their own future behavior. * * *
>
> Consent alone is insufficient to support a commitment by a public official that ties the hands of his successor. * * *

To the extent that contractual rules apply in construing consent decrees, it is important to note that the *Evans* consent decree resulted from bargaining which must have included each party's estimate of what potential rights existed under state law. Consideration is the bedrock of every contract. The *Evans* plaintiffs' giveup was part of the legal consideration they parted with in return for obtaining the benefit of the injunction.

Before *Rufo* the contractual aspects of consent decrees received great emphasis in the Seventh Circuit. An easy

example of this is found in *United States v. City of Northlake*, 942 F.2d 1164 (7th Cir. 1991). In refusing to hold that hiring practices by the CITY fell outside the scope of a racial discrimination consent decree, the Court stated:

> First the enforcing court will look to the plain language of the written agreement as the best expression of the parties' intent. If, as this Court as noted before, "the language of the contract unambiguously provides an answer to the question at hand, the inquiry is over" *Lumpkin v. Envirodyne Indus, Inc.*, 933 F.2d 449, 456 (1991), quoting *LaSalle Nat'l Bank v. Service Merchandise Co.*, 827 F.2d 74, 78 (7th Cir. 1987). If the plain language of the writing is unclear, then parol or other extrinsic evidence must be considered in order to reconstruct the intent of the parties at the time they entered into the agreement. * * *

Another pre-*Rufo* Seventh Circuit decision which lent additional weight to the contractual interpretation theory was *The Money Store, Inc. v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) The issue was whether a judgment entered after a full hearing in a trademark dispute could be modified. Affirming the trial court's refusal to modify the decree, the court held there were two fundamental principles in Rule 60(b)(5) cases: (1) the showing of "extraordinary circumstances" and (2) disallowance of any relitigation of issues which were resolved by the judgment.

Another pre-*Rufo* trend was a Supreme Court hostility toward modification of consent decrees in general, signaled by three opinions: *Fire Fighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984); *Local 93 International Association of Fire Fighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d (1986) and *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) The majority opinion in *Stotts*, au-

thored by Justice White, endorsed a "four corners" interpretation of the decree and not what "might have been written had the Plaintiff established his factual claims and legal theories in litigation." (104 S.Ct. at 2586) By contrast, Justice Blackmun's dissent in *Stotts* criticized the majority for its strict construction of the consent decree. (467 U.S. at 609) His position was that the trial court was uniquely capable of determining the parties intent and the purposes that shaped the decree. (467 U.S. at 609) In *Local 93*, the court also favored an interpretation of consent decrees which acknowledged that the decrees have a contractual aspect, in that they are often arrived at through extensive negotiations between the parties. (478 U.S. at 519, 521-22) The majority maintained that it was the agreement of the parties, rather than the underlying law, that creates the obligations contained in the decree. (478 U.S. at 522) Once again there was a contrasting dissent in which Justice Rehnquist insisted that the scope of a consent decree is not determined from the obligations of the parties but rather the "federal statute pursuant to which the decree is entered." (478 U.S. at 536-38) Then in 1991, Justice Rehnquist authored the majority opinion in *Dowell* which did not abandon the "four corners" rule but at the same time expressed the willingness of the court to look beyond the terms of the decree itself to the purpose of the decree. (111 S.Ct. at 636-637) Although *Dowell* may be interpreted as adhering to the strict construction standard for interpreting consent decrees, *Dowell* seems to add incrementally to the confusion. The lower federal courts seem to feel free to pick and choose the particular guideposts for interpretation which seem most appealing under the circumstances. One court may select the "four corners" rule; another may pick the "underlying purpose" approach.

Evans III is a lesson in why Justice Blackmun's thesis in *Stotts* that the trial court is uniquely capable of deter-

mining the parties intent and the purposes that shaped the consent decree, probably will not work well or at all. In *Evans III*, the trial court had initially decided to vacate the consent decree on the basis that the decree had been motivated solely by the result in *Evans I*. Thereafter Plaintiffs filed a motion to reconsider on the basis that the Trial Court in so ruling had really decided a question of fact without a hearing. The court agreed with this argument and thereafter an evidentiary hearing was held. In that hearing CHICAGO asserted an attorney-client privilege as to certain matters and the court heard testimony ". . . about what was in the minds of the Mayor and his aides, who are now deceased. (App. 62) As a result of the hearing, the trial court ruled that motivation in entering into the consent decree was irrelevant. Certainly this procedure illustrates that trying to retrace the path of litigation and excavate what motives prompted the bargaining of the parties six years or more before is an inherently difficult, even speculative process. The concept that a trial court can decide what the parties really meant to do in terms of the underlying purpose of the decree, when the parties really said nothing beyond what is recited in the decree, illustrates why the parol evidence rule in contract law still enjoys vitality. It is ". . . no simple matter for a court to surmise what contracting parties would have done had they foreseen a situation." Comment, *The Supreme Court, 1991 Term; Leading Cases*, 106 HARV.L.REV. 163, 295 n. 43 (1992).

After *Rufo*, at least three decisions have reaffirmed the contractual aspect of consent decrees. *Collins v. Thompson*, 8 F.3d 657 (9th Cir. 1993) and *Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993) involving two justices who were among the plurality in *Evans III*, which states:

> The district court's entry is subject to several interpretations. One reading suggests a belief that con-

> sent decrees, at least those stemming from constitutional grievances, cannot impose upon the parties rights and obligations greater than those required by the Constitution. This view quite simply is incorrect. Consent decrees often embody outcomes that reach beyond basic constitutional protections. *See Rufo*, 112 S.Ct. at 762 * * *; *see also Langton v. Johnston*, 928 F.2d 1206, 1217-18 (1st Cir. 1991). Indeed, it is a rare case when a consent decree establishes only the bare minimum required by the Constitution. Often, it is precisely because parties are unsure of the current posture of the law that they are willing to compromise their positions. (9 F.3d at 641)

And *Crumpton v. Bridgeport Education Association*, 993 F.2d 1023 (2d Cir. 1993) holds that the consent decree is to be interpreted within its four corners and not by what "might have been written had the plaintiff established his factual claims and legal theories in litigation", citing *United States v. Armour & Co.*, 402 U.S. 673, 681-682, 91 S.Ct. 1752, 1757-1758, 29 L.Ed.2d 256 (1971).

Surely the *Evans* consent decree settled more than was required by the federal constitutional floor, in that state law claims were also settled, for purposes of the injunction. If the decree is allowed to be swept away in its entirety, then the *Evans* plaintiffs gave up valuable state law rights and got nothing in return of any durable value. In truth, federal consent decree settlements after *Evans III* cannot be attractive to plaintiffs who thereby encounter the danger of losing those very rights which were thought to have been acquired by the settlement. As the *Evans III* dissent states: (App. 19)

> * * * If courts refused to enforce contractual agreements, "people would be reluctant to enter into contracts and the process of economic exchange would be retarded."

The plurality in *Evans III* does not consider that governmental entities can be bound to their consent decree

contracts. Consistent with this view, the plurality chose to view the consent decree only as a judgment and not as a contract to which the "four-corners" rule of interpretation might be applied. Surely the judgment-versus-contract dichotomy must be the least helpful method of analysis in deciding whether a consent decree should be modified. Relative to this artificial analysis it is said that it is ". . . the enforcement mechanism that makes the consent decree a judicial act." *Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). In the *Evans* litigation CHICAGO makes no allegation that the trial court was ever asked to consider a problem relating to enforcement of the decree. In fact, there was none. The reporting requirements in the decree ended in 1987. (App. 106) This decree was self-executing and needed no enforcement. All CHICAGO had to do was to follow the formulas spelled out in the decree for appropriating sufficient funds annually to pay tort judgments and for processing the judgments for payment.

Evans III is significant as an example that some of the lower federal courts could feel free to interpret *Rufo* as a tectonic shift in emphasis allowing great freedom in modifying consent decrees. And yet, other post-*Rufo* decisions still appear to adhere to the stricter contractual interpretation standard. Any honest assessment should acknowledge considerable confusion in the lower federal courts with respect to the *Rufo* standards.

III.

THE *EVANS III* PLURALITY OPINION DOES NOT REQUIRE PROOF OF EXTREME AND UNEXPECTED HARDSHIP RESULTING FROM FUTURE ADHERENCE TO THE CONSENT DECREE.

The plurality opinion in *Evans III* dispenses with any necessity for a litigant seeking modification of a consent

decree to prove that unexpected hardship will result from future continuation of the decree. *Rufo* states that modification of an "institutional reform" type consent decree ". . . may be warranted when changed conditions make compliance with the decree substantially more onerous. . . ." (112 S.Ct. at 760) CHICAGO did not even allege hardship as a ground for relief.

Some decisions before and after *Rufo* expressly require a showing of unanticipated hardship. *Gore & Associates, Inc. v. C.R. Hard, Inc.*, 977 F.2d 558 (D.C. Cir. 1992), for example, involved a plaintiff patent infringer seeking to modify an injunction entered by consent as part of a settlement agreement. The court, reciting (at 977 F.2d 560-561) what it believes are the applicable rules, appears to lean in favor of a rather strict four-corners interpretation as follows:

> For a judgment entered on consent, the asserted reasons for the requested modification must be evaluated in the context of the negotiated bargain between the parties at the time of the settlement, this bargain adding weight to the policies of res judicata. In *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 88 S.Ct. 1496, 20 L.Ed.2d 562 (1968) the Court explained that although a decree may be changed in appropriate circumstances, "it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.* at 248, 88 S.Ct. at 1499. That a contract voluntarily made turns out to be less or more favorable to one of the parties is insufficient ground for judicial intervention.

The court in *Gore* was faced with a request for modification solely premised upon a conceded change in the applicable law, the applicant's contention being that no showing of hardship was necessary. Finding "no support in precedent for that abstract proposition, which would lead

to pernicious instability of final judgments" (977 F.2d at 563) the court refused modification. A similar result occurred in *United States v. City of Chicago*, 978 F.2d 325 (7th Cir. 1992) ordered a consent decree in an employment discrimination case modified where hardship unforeseen at the time of the original decree made it inequitable to continue it without modification. And the Seventh Circuit also held in *The Money Store, Inc. v. Harris Corp. Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989) that proof of hardship was required.

Another recent decision in a school desegregation case tracks *Rufo*'s "substantially more onerous" language. *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1993). Another verbal formula is simply to follow the basic language of Rule 60(b)(5) and hold that any change in circumstances sufficient to ". . . render the continuance of the injunction in its original form inequitable" will allow vacation of a consent decree. *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993). This is a loose standard which practically invites defendants to the banquet table of additional litigation. A strict construction of the majority opinion in *Rufo* would indicate that where a "clarification in the law" completely obliterates the jurisprudential underpinnings of any specific part of a consent decree, the party requesting modification must nonetheless plead and prove, in addition, that the change in law makes it "substantially more onerous" for that party to comply with the decree. Although this seems clear from *Rufo*, the lower federal courts do not seem to have perceived such clarity, and as a result the 'hardship' standards for decree vacation since *Rufo* display wanderlust rulings not closely tied to *Rufo* standards.

IV.

THE *EVANS III* PLURALITY EFFECTIVELY ELIMINATES STATE LAW CLAIMS PENDENT JURISDICTION FROM THE PROTECTION OF FEDERAL CONSENT DECREES.

Rufo does not directly address how to deal with state law claims settled in a consent decree which the settling defendant later seeks to vacate on the basis of a change in federal law. The guidance in *Rufo* on this point is that the decree does not have to be interpreted by reference to the federal constitutional floor. The plurality in *Evans III* rules precisely counter to this rule. The plurality holds that a federal consent decree must rest upon a "substantial federal claim", both at the time the decree is entered and at such later time as the decree is being analyzed for purposes of vacation. The plurality thus accords the plaintiffs' state law claims no significance whatsoever. Plaintiff *Evans* claims that the giveup of plaintiffs' state law claims was a major negotiated waiver constituting legal consideration for the contractual bargain. These claims, once they were settled in the decree by agreement, could no longer be asserted in the future by plaintiffs as the basis for injunctive relief. The consent decree in this respect had the same preclusive effect as would result from any other type of judgment.

State law judgments have preclusive effect on a federal claim which was presented to the state court or which could have been presented, provided that the state court had jurisdiction and afforded a full and fair opportunity to litigate the federal claims. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Vandenplas v. City of Muskego*, 753 F.2d 555 (1985), *cert. den.*, 472 U.S. 1018, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985); *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987).

The reverse is also true, namely, that a state law claim incorporated in a federal court judgment cannot later be relitigated between the same parties. A recent decision by the 10th Circuit dealt with language in a consent decree similar in its breadth to the language in the *Evans* consent decree. In *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) a mineowner and the State of Colorado entered into a consent decree which stated that it settled "all claims between the parties which have been raised in State's complaint." Private landowners in Colorado brought suit against the mineowner to recover for property damage and economic losses allegedly caused by hazardous waste products of mining. The court held that the decree was a final judgment on the merits of state law claims for purposes of res judicata. The *Satsky* holding means that broad settlement language in a federal consent decree is a bar to any state law claims which were brought or could have been brought, and only federal claims are subject to modification or vacation.

Illinois follows a claim preclusion rule essentially identical to the federal rule. The Illinois rule holds that any matter which could have been litigated by the same parties in a prior federal court proceeding is a complete bar to raising such a claim in a later Illinois proceeding. *Housing Authority for LaSalle County v. Young Men's Christian Association of Ottawa*, 101 Ill.2d 246, 461 N.E.2d 959, 78 Ill.Dec. 125 (1984); *Gregory v. County of LaSalle*, 40 Ill.2d 417, 240 N.E.2d 609 (1968); *United Mfg. Co. v. Mitchell Novelty Co.*, 350 Ill.App. 321, 113 N.E.2d 78 (1st Dist. 1953) (Abstract Opinion); *In Re Estate of Luer*, 348 Ill.App. 324, 108 N.E.2d 792 (4th Dist. 1952).

The bottom line of these rules is that when an action involving both state law claims and federal civil rights act claims winds up in federal court, either through an original filing there or by a defendant's removal from an original filing in state court, a federal consent decree will

probably settle all claims. Theoretically, separation of the state/federal claims can occur. Remand of the state claims to state court is possible either by an order by the federal trial court dismissing the state law claims without prejudice or declining to exercise further pendent jurisdiction over them. Realistically it will not happen. It is not to the advantage of a defendant to agree to settle only federal claims and permit the state law claims to drag on in state court. And it is likely that any comprehensive settlement in federal court will effectively embrace and remedy the perceived wrongs under state law.

For a case such as *Evans*, the implications of the claim preclusion rule are enormous. *Evans* asserted state law claims under Illinois statutes and the Illinois Constitution. As part of the settlement, these claims, and any other claims which might have been asserted, were compromised and disappeared, in terms of the injunctive relief sought. The *Evans III* dissent states: (App. 19)

> * * * The Consent Decree later indicates that it is a "final and total settlement of all claims [that the plaintiffs] now have or may have in the future, arising either directly or indirectly out of [the Illinois Code], as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees."

Focusing on this language, the dissent states: "The plurality's assertion that Chicago in 1984 did not settle *any* aspect of the merits of the dispute is simply and transparently wrong." (App. 18) Claim preclusion is an integral aspect of this analysis. The *Evans* plaintiffs are now in the position of having bargained away their state law claims. They absolutely cannot apply now to an Illinois state court to regain them based upon a federal court judgment which has been vacated and set aside. Claim preclusion rules prevent it. The point of view of the *Evans III* plurality is that no part of the settlement was "on the merits."

This is irrelevant if the settlement bars relitigation of non-federal claims. In sum, the view adopted by the plurality does not accommodate any principles of state law claim preclusion to federal consent decrees and does not recognize that the giveup of state claims was part of the legal consideration for the contractual aspect of the decree.

V.

THE SEVENTH CIRCUIT PLURALITY DECISION DOES NOT REQUIRE THE PARTY REQUESTING MODIFICATION TO TAILOR A PROPOSED MODIFICATION TO THE CHANGE IN THE LAW RESULTING FROM *EVANS II*.

Rufo states (112 S.Ct. 763):

> Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the District Court should determine whether the proposed modification is suitably tailored to the changed circumstances. * * *

Just as CHICAGO did not allege any hardship resulting from the decision in *Evans II*, CHICAGO did not offer any proposed modification in the nature of a tailoring of the existing Consent Decree to the change in the law. CHICAGO simply insisted that the change in the law destroyed the entire foundation of the Consent Decree, and the Decree should be vacated in its entirety. *Rufo* further makes clear that in evaluating the proposed modification to see that it is suitably tailored the district court must consider three factors: 1) the proposed modification must not create or perpetuate a constitutional violation; 2) the proposed modification should not strive to rewrite a Consent Decree so that it conforms to the constitutional floor; and 3) given the foregoing constraints, the District Court should defer to local government administrators, including matters relating to the financial impact of the proposed change. (112 S.Ct. at 763-764)

The District Court in this instance did employ a tailoring approach. The court said that the legal underpinning of the consent decree had not been eliminated in its entirety. The trial court observed that *Evans II* did not hold that certain practices of CHICAGO did not constitute denials of due process. Rather, the due process issues left open by *Evans I* were settled in the consent decree (App. 60) The court further said that the due process issues were not, in the language of Rule 60(b)(5), reversed, vacated or overruled and thus the Rule as applied to those other issues did not apply and CHICAGO did not qualify for relief thereunder. (App. 60) On the subject of equitable considerations, the trial court made two points. First, the court said: (App. 64-65)

> "* * * It would be inequitable for this Court to say to the Plaintiffs that having given up their right to litigate the due process issue and having had that surrender confirmed by the express holding to that in *Evans II*, that they must forfeit the benefit of that bargain. That would be inequitable, and that is why the second part of Rule 60(b)(5) provides no comfort whatever for the CITY. There is no basis upon which this court could hold that it is no longer equitable that the judgment should have prospective application."

Secondly, the trial court stated that language used in the *Evans II* opinion such as, "The reasons presented by the City for the practice are by no means compelling." are not a description of a position which cries out for equitable intervention. (App. 65)

Plaintiff Evans submits that any tailoring approach should take into account the presence of the unresolved state law claims in *Evans*. Tailoring must also be geared to the 1986 change in the applicable state statute. Most of all, *Rufo* would seem to require an inquiry into what tort judgment payment procedures CHICAGO proposes to follow in the event the decree is vacated, with particular reference to the mandates of state law. The plurality opinion in

Evans III eliminates any of the forgoing considerations as relevant to a consent decree modification inquiry. What appears to be a required evaluation by *Rufo* is totally dispensed with in the plurality opinion.

VI.

EVANS III VIOLATES THE RULE ANNOUNCED IN *RUFO* THAT A CONSENT DECREE SHOULD NOT BE MODIFIED OR VACATED TO CONFORM TO THE FEDERAL CONSTITUTIONAL FLOOR.

Rufo expressly acknowledges the principle that a consent decree can incorporate an undertaking to do more than is strictly required by the federal constitutional law. *Rufo* states: (112 S.Ct. at 762-764)

> (1) "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. * * *" (112 S.Ct. at 763)
>
> (2) "But we have no doubt that, to "save themselves the time, expense and inevitable risk of litigation", *United States v. Armour & Co.*, 402 U.S. 678, 681, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971), petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than a court would have ordered absent the settlement. * * *" (112 S.Ct. at 762-763)
>
> (3) "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court

> should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires. * * * (112 S.Ct. at 764)

Evans III went beyond the constitutional floor when the plurality undertook to justify vacating the consent decree by ruling upon a substantive due process issue which the plaintiffs were barred from raising in the *Evans III* appeal. It should be noted that the *Evans III* plurality does not reach certain issues which were in controversy at the time the consent decree was negotiated. The plurality does not reach any of the state law issues, nor is there a discussion of whether Section 9-104(a) of the Illinois statute was facially unconstitutional or whether the practices of CHICAGO, as distinct from the practices required in the statute, violated procedural due process. The District Court, it will be recalled, had indicated that CHICAGO simply did not follow any 'process' at all.

Certainly at the time the consent decree was entered constitutional claims were presented other than the equal protection claim which, at minimal value were 'colorable' and, viewed more expansively, were persuasive. The dissent in *Evans III* saw these claims as "at least colorable" (App. 21, 22) Justice Flaum, in particular, stated: (App. 22)

> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in *Evans II* or in any other case since alters that conclusion. The district court, intimately familiar with the decree and its foundations, understood the precise import of *Evans II* and acted well within its discretion in modifying the decree accordingly. I also see no inequity at this time in continued enforcement of the decree. Chicago does not complain that compliance has now become onerous and, indeed, even indicates its intention, with or without the decree, to continue to pay tort judgments promptly.

The majority in *Evans I* in a *dictum* commented favorably on the due process issues, (App. 126-127) and Judge Thomas in a concurring opinion felt they were squarely in issue in the appeal. (App. 132) The district judge had looked favorably on these claims. (App. 114)

If before *Evans III* there had been just one clear decision which indicated that the federal procedural and substantive due process claims as asserted in *Evans* were unsupportable, then surely the plurality in *Evans III* could be said to have followed the narrow prescription of Rule 60. The fact is, there is no such decision. Nonetheless the plurality chose to embark on a doctrinal safari not tied to any known precedent.

VII.

EVANS III EMPLOYS AN IMPROPER DE NOVO STANDARD OF REVIEW IN WHICH QUESTIONS OF FACT ARE DECIDED BY THE REVIEWING COURT.

The plurality opinion in *Evans III* gives lip service to the required standard of review, which it agrees is abuse of discretion. (App. 17) The plurality then proceeded to impose a broad and liberal "lookback" standard to modification of a Consent Decree. The lookback, done at the time a later modification is sought by a party to the original Decree, requires an evaluation of the motives of CHICAGO in entering into the consent decree. The plurality states: "This consent decree is 'based' on *Evans I* rather than an independent compromise of the due process claim."; the CITY "knuckled under" to the consent decree because *Evans I* implied it must do so. (App. 5) This is an idiosyncratic viewpoint which deliberately gives little weight to the intention of the parties gleaned from the language of the consent decree itself. Instead, the majority itself decided in this case what CHICAGO must have been thinking. The plurality's conclusion rejects the Trial Court's

own express finding after the evidentiary hearing on motivation: (App. 60)

> Is the consent decree based on a judgment which has been reversed or otherwise vacated? The answer is yes, in part. The equal protection holding of Evans I was the law of the case as of the entry of the consent decree and, I think, clearly entered into those considerations which resulted in the consent decree. * * * Nothing else is based upon a judgment that has been reversed or otherwise vacated or overruled.

On the one hand, the plurality's approach seems a creative departure which wanders far from the standard of abuse of discretion contemplated by *Rufo*. On the other hand, *Rufo* states that a change in the law may provide a basis for modifying a decree ". . . if the parties had based their agreement on a misunderstanding of the governing law." (112 S.Ct. at 763) The latter dictum seems to invite a trial court to perform a legal autopsy on the mentation of the parties long after the decree has been laid to rest. Notwithstanding this, the plurality's conclusion of what motivated CHICAGO to settle, is exactly the opposite of the express finding by the trial court after an evidentiary hearing, that motivation of the parties was irrelevant. This was the literal contention advanced by CHICAGO. Even more astonishing, this finding of fact by the plurality which ignored the plain language of the decree appears to contradict what was decided in the Seventh Circuit three weeks previously in *Kindred v. Duckworth*, 9 F.3d 638, 642 (7th Cir. 1993)

> * * * . . . the text of the decree provides no support for the proposition that its terms are tied to minimal constitutional safeguards. If the parties had intended to draft such a document, one would expect either express language to that effect or, at least, terms which encompass the barest of then-extant constitutional rights. Neither circumstance exists here. * * *

It is plain from the decree what claims motivated CHICAGO. There were three groups of claims: (1) the equal protection claim decided in *Evans I*, (2) the federal due process claims, both procedural and substantive, arising from the practices of CHICAGO and (3) the state law claims. The trial court observed that the federal due process claims, measured against the language of Rule 60(b)(5) had not been vacated or overruled in *Evans II*. The trial court agreed with the claim by CHICAGO that its motivation, confronted with these various claims, was irrelevant. Thus this litigation is unusual in that CHICAGO could not prove that it based its consent to the settlement on a misunderstanding of the applicable law for two reasons. First, there were a variety of claims upon which the settlement could have rested with no adequate proof that CHICAGO's motivation rested exclusively or even primarily upon the equal protection claim already decided in *Evans I*. Secondly, CHICAGO insisted that its motivation was irrelevant. This insistence may have stemmed from CHICAGO's own assessment of its chances of persuading the trial court in the evidentiary hearing that the loss of the equal protection claim in *Evans I* was its only motive or the predominate motive for settling. Whatever the reason, CHICAGO should remain tied to its trial court position. Obviously the *Evans III* plurality did not feel so constrained. Plaintiff *Evans* submits that the plurality decision is an unambiguous example of a reviewing court deciding a question of fact contrary to the decision in the trial court, contrary to the position of a party and contrary to the required standard of review. The violation of the standard of review was underlined in the dissent: (App. 21)

> Finally, I am astonished by the plurality's suggestion that we have announced a "rule of law" for the future guidance of district courts. Pl. Op. at 17. Here, of course, we are violating the basic principle of strong deference to the district court in the construction of

its own consent decrees. It does not seem to me that we are announcing a rule of law. It is more like a rule of anarchy. The solemn promises of governments bind only for the day. * * *

CONCLUSION

Unless the consent decree modification standard is inextricably tied to a post-decree decision which has reversed or vacated each salient point of law upon which the previously entered decree rests, the federal courts can expect to be besieged with decree modification requests. Lawyers worry about their patrons' criticism for failing to do something that has any slight chance of succeeding. And governmental entity litigants holding the reins of decision sometimes have little to lose but the time and expense of taking a chance at a lucky outcome.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

Relevant Statutes and Rules

1. Section 1983 of the Federal Civil Rights Act, 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Rule 60 of the Federal Rules of Civil Procedure provides:

> Relief from Judgment or Order.
>
> (a) Clerical Mistakes. * * *
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * *
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SYLVIA EVANS, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

BERTHA BALARK, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SYLVIA EVANS, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

BERTHA BALARK, et al., Petitioners,

v.

CITY OF CHICAGO, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-3277

SYLVIA EVANS, Administrator of the Estate of Andrew Evans, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4119, 79 C 1939, 79 C 2493—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 8, 1993—DECIDED NOVEMBER 24, 1993

Before POSNER, *Chief Judge*, and CUMMINGS, BAUER, CUDAHY, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Now 16 years old, this case is making its third appearance in this court—and the parties' current dispute arises out of the conflicting decisions of the first two panels. We meet in banc to consider whether a district court should require a unit of state or local government to abide by a consent decree that does not serve any federal interest. The answer is No, and the injunction based on the parties' agreement therefore must be vacated.

I

During the late 1970s and early 1980s, the rate of interest Chicago paid on judgments (6% per annum for municipal governments, 735 ILCS 5/2-1303) was substantially less than the market cost of credit. Judgment debtors had every reason to postpone payment as long as this imbalance persisted. Instead of borrowing in the market at 15%, or raising taxes, Chicago borrowed from its judgment creditors. It paid tort judgments of $1,000 or less, and all contract judgments, quickly. The City Council did not appropriate funds sufficient to pay other judgments in the year the courts entered them. By 1979 plaintiffs without the political clout to jump the queue had to wait on average 47 months for payment. An active secondary market in judgments against Chicago developed. About 80% of judgment holders sold in this market, accepting a discount of approximately 25% off the face value of their awards. *Evans v. Chicago*, 689 F.2d 1286, 1290 (7th Cir. 1982) (*Evans I*).

Suits challenging Chicago's delay in payment were filed, certified as class actions, and consolidated. By summary judgment the district court held that Chicago's practice of paying small judgments quickly while deferring payment of larger ones violated the due process and equal protection clauses of the fourteenth amendment: due process because it deprived judgment creditors of a "property" interest in immediate payment created by state law, and equal protection because there was no rational basis for distinguishing large from small awards. A panel of this court affirmed the portion of the judgment that rested on the equal protection clause, *id.* at 1299-1300, while vacating the due process aspect as premature. *Id.* at 1296-99. Dicta in the opinion strongly imply that the City deprived the plaintiffs of due process of law. *Id.* at 1297-98.

On remand the district judge told the parties and their lawyers that the combination of his opinion and ours condemned Chicago's practices en toto. He directed the parties to negotiate appropriate relief. They complied, and

the judge approved a consent decree eliminating the distinction between large and small judgments, requiring all judgments to be paid in order of their entry, and providing that the Mayor must ask the City Council to appropriate enough money to pay all judgments promptly. The litigants could not agree whether the plaintiffs were entitled to damages for delay in payment. The district court concluded that they were, under the equal protection clause—both the plaintiffs and the district court deeming the due process theory surplusage in light of the equal protection holding. Another panel of this court reversed, overruling *Evans I*. 873 F.2d 1007 (7th Cir. 1989) (*Evans II*). The second panel (with the acquiescence of the full court, see *id.* at 1008 n.*) concluded that the City had a rational basis, if only administrative convenience and the placation of the more numerous holders of small awards, to pay little judgments before big ones. *Id.* at 1015-18. The second panel wrapped up: "The district judge advanced some worthy ideas, but they are for the City's self-determination, and will not be imposed by this court. It is regrettable that this matter which has lingered so long now takes a new and possibly unexpected turn, but what we now view as error must be arrested even at so late a date. Improvements in this situation are better left to the state and municipal governments." *Id.* at 1017-18.

Chicago then asked the district court to vacate the injunction and return the subject to "the City's self-determination". Interest rates have changed; today the legal rate approximates the market rate, so Chicago would pay promptly even if the injunction were not in force. Still, it wants to redeem its governmental powers, now in hock in a district court. The motion invoked Fed. R. Civ. P. 60(b)(5), which permits a court to modify a judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application". *Evans I*, which led to the settlement, was gone; the City added that in its view it is also "no longer equitable" that a judgment affecting its legislative functions remain in

force when the judgment does not serve a federal interest. Rule 60(b)(5) applies to consent decrees as well as to other judgments. *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992). Recognizing that the decree's foundation had been washed away, the district court set it aside. *Rufo*, which holds that consent decrees regulating the conduct of state or local governments may be modified more freely than those entered by private litigants, supports this disposition.

On motion for reconsideration, however, the district judge reversed course. He observed that *Evans II* addressed only the plaintiffs' equal protection theory—for the plaintiffs had not urged the panel to affirm the award of damages on due process grounds. 873 F.2d at 1012 n.11, 1018 n.15. Because *Evans II* did not bear on the due process theory, there had not been any change of law affecting this aspect of the plaintiffs' case. When Chicago agreed to pay judgments faster, the district court believed, it was settling the due process claim along with the equal protection claim. The district judge therefore revised the injunction to delete only so much of the relief as *Evans II* had expressly held inappropriate. The sole provision satisfying that description was the portion forbidding Chicago to distinguish judgments according to size. Deleting that element was nugatory because of the separate provision compelling the City to pay judgments promptly and strictly in order of their entry. Stuck exactly where it was before *Evans II*, Chicago asks us to annul the consent decree and the injunction implementing it.

II

No one doubts that *Rufo* and Rule 60(b)(5) entitle Chicago to relief to the extent the decree rests on the equal protection theory. The injunction intrudes on the internal operations of the City, telling the Mayor what items must be in the annual budget. *Evans II* rightly said that, although changes may be beneficent, the political rather than the judicial process is responsible for the subject.

Governments may undertake to do more than the Constitution requires. *Rufo*, 112 S. Ct. at 760-63; see also *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986). If there were something to the due process theory (a big if, discussed in Part III below), a decision removing all but this one theory would leave room for settlement, as the district court said. The initial problem with its decision, however, is that Chicago did not settle *any* aspect of the merits. It litigated the merits to the nines and settled only the details of relief.

Rule 60(b)(5) calls on the court to ascertain whether a judgment is "based" on some earlier decision. This consent decree is "based" on *Evans I* rather than an independent compromise of the due process claim. Plaintiffs wanted money. The City refused to pay, and after issuing an injunction the district judge held a trial on damages. Chicago appealed from an adverse decision, leading to *Evans II*. If the consent decree really represented a compromise of the merits—even of the due process theory alone—there could not have been an *Evans II*. Yet on appeal in *Evans II* the plaintiffs did not contend that the merits had been compromised; it was plain to all that the merits (and damages) were still in dispute. All that had been compromised was prospective relief. Chicago "agreed" to do what *Evans I* implied that it must do. " 'Consent' that is no more than knuckling under to the inevitable is more like an adjudication than a contract." *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1338 (7th Cir. 1992), quoted in *United States v. Chicago*, 978 F.2d 325, 333 (7th Cir. 1992).

Before accepting the parties' agreement, the district judge made clear his view that *Evans I* (and his own prior decision) resolved the merits, leaving for decision only issues about relief. If *Evans I* condemned the City's approach to paying judgments, the parties had no need to settle the due process claim. After a decision on one claim resolves the case, neither judge nor litigants needs to address additional legal theories. The district judge told the parties in no uncertain terms that *Evans I* resolved the

merits, and that nothing remained but to select the appropriate relief. When Chicago bridled, the judge announced from the bench on October 26, 1983:

> Now, I have got to have an order from the City and the plaintiffs. I have got to have an agreed order that will bind the City to pass a budget sufficient to pay tort judgments.
>
> * * *
>
> If by November 25th, approximately a month from now, I do not have in my hands an agreed order that calls upon the City and requires the City to budget annually an amount sufficient to pay tort judgments along the lines which we have been discussing in great detail at our recent and not so recent conferences in chambers, then I am going to go ahead and enter my own order.
>
> * * *
>
> I see no need for any further conferences with counsel that go to basic philosophy or go to what I have been saying this afternoon. If there is some mechanical thing you want to talk about that I can help you with, I will be happy to sit down, but just to rehash this question about whether we are going to do something in this case that the Court of Appeals ordered done a long time ago, the time for discussion has passed.

The judge believed that *Evans I* dictated *what* to do, but not *how*. Mechanical details remained for decision. And the details of prospective relief are all the parties compromised. The merits were not settled. They were litigated, twice. The City lost in *Evans I* and won the rematch in *Evans II*.

III

Let us suppose, however, that this understanding is inaccurate. The question remains whether in the language of Rule 60(b)(5) "it is no longer equitable that the judg-

ment should have prospective application". The district court treated this case the same way it would if the defendant were a private merchant that had agreed to sell the plaintiff a ton of steel: a contract's a contract, and *pacta sunt servanda*. Yet this is no ordinary contract. First, it requires continuing supervision by the district court. Judges need a good reason, one in addition to the parties' say so, before diverting attention from other business in this fashion. *System Federation v. Wright*, 364 U.S. 642, 651 (1961) ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."); *Firefighters v. Cleveland*, 478 U.S. at 525 (A "federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions."). Second, the decree entangles an arm of federal government in the administration of another sovereign, monitoring the budgetary decisions of a Mayor and City Council rather than enforcing strictly legal rights. Again such a step may be taken with justification, cf. *Missouri v. Jenkins*, 495 U.S. 33 (1990), but the parties' consent is not automatically sufficient.

Especially not when one of "the parties" did not consent. This is the third, and most potent, objection to the district court's approach. "Chicago" did not reach a settlement with the plaintiffs. The consent decree was entered in 1984. Negotiations were conducted on Chicago's behalf by its corporation counsel, who we may suppose acted with the approval of Harold Washington, then Chicago's mayor. Although the decree purports to last for all time—and the district court's decision refusing to vacate the decree even after *Evans II* reflects a belief that the commitments *ought* to run perpetually—democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal; what one mayor decrees during his four-year term, another may revoke. Today's lawmakers have just as much power to set public policy as did their predecessors. "Chicago" speaks through its elected representatives, and the people are free to upset even the most enlightened policies of earlier times.

The current mayor wants to be free of his predecessor's commitment, concluding that more flexibility over budgets will promote the public welfare. People of good will could be on either side of this disagreement; each mayor may have correctly perceived the needs of the moment.

Governments are in this respect unlike corporations or other contracting parties. A corporate board of directors may enter into commitments that continue after new directors take office; a legislature may not. True, governments may form contracts (for example, to build a new road or repay a loan) and must keep these commitments by virtue of the contract clause of the Constitution, Art. I, §10, cl. 1. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). But temporary officeholders may not contract away the basic powers of government to enact laws—or in this case to adopt budgets—in the same way natural persons may make enduring promises about their own future behavior. *Wilbur v. United States*, 281 U.S. 206, 217 (1930); *Stone v. Mississippi*, 101 U.S. 814, 817-18 (1879); *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. 420 (1837). Why then should things differ if the parties choose not the device of a seal (or even of a statute) but the imprimatur of a district judge? See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295; cf. Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, *id.* at 241, 269 n.105.

Consent alone is insufficient to support a commitment by a public official that ties the hands of his successor. Accord, *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (in banc) ("Courts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court."); *United States v. Miami*, 664 F.2d 435, 440 (11th Cir. 1981) (in banc). Thus the answer to the question "why should consent decrees be enforced when

contracts out of court are not?" must concentrate on legal rules that shape the parties' agreement. A promise by a public official is of limited utility when only the official's word supports the commitment. A consent decree may be—under *System Federation* must be—based on more than consent. It depends on rules of law that govern the public official's conduct. " '[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree." *Firefighters v. Stotts*, 467 U.S. 561, 576 n.9 (1984), quoting from *System Federation*, 364 U.S. at 651. A state official's promise to follow a rule of federal law retains its force because of the continuing effect of the law, which the state cannot alter. And a settlement of a dispute about the meaning of that law may be enforced if the agreement compromises genuine uncertainties, for then the public official actually may be enhancing or preserving the powers of the democratic branch (by avoiding a worse outcome after trial) rather than ceding the powers of the government.

This method of justifying the implementation of consent decrees implies, however, that the court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder. When making these inquiries, courts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance. Over the last decade a series of decisions in this circuit has emphasized the district court's responsibility to identify the rule of federal law supporting a consent decree binding the political arms of government, and the corresponding obligation to permit new public officials to set their own policy within the limits established by federal law. We mention only a sample of these cases, beginning with another decision by the full court.

As part of a settlement of litigation protesting investigations calculated to stifle dissident groups, the Department of Justice promised to continue using a set of investigatory techniques specified in guidelines developed by Attorney General Levi in 1976. In 1983 Attorney General Smith promulgated a new set of guidelines, which like the Levi guidelines fully complied with all constitutional requirements but which differed from the Levi guidelines in respects the plaintiffs deemed material. Relying on the consent decree, the district court forbade implementation of the Smith guidelines to the extent they differed from the Levi guidelines. This court held, however, that despite one Administration's promise, Attorneys General are entitled to reach, and implement, different conclusions about appropriate investigative techniques, so long as the new rules adhere to all legal norms. *Alliance to End Repression v. Chicago*, 742 F.2d 1007 (7th Cir. 1984) (in banc). Although the case involved interpretation rather than modification of the decree, the court emphasized the importance of allowing the political branches of government to reach, and update, independent conclusions about law enforcement techniques. Doubts were to be resolved in favor of leeway for the political branches: "We doubt that in agreeing to the consent decree the Justice Department tied its hands to such an extent; for if it did, it was trifling with the public safety . . . and maybe even violating the President's constitutional obligation to 'take Care that the Laws be faithfully executed.' " 742 F.2d at 1014. "And what did [it] get in return for abandoning that duty, if that is what it did? [The plaintiffs] would not have gotten a broader injunction if they had pressed the case to trial and won than they got in the consent decree. . . . The decree as it stands is a remarkable judicial intervention in vital executive functions; a proper decree formulated after a trial would not have been more Draconian." *Id.* at 1015. Such considerations led the court to infer that the executive branch had not contracted away its powers after all. See also *id.* at 1020. Pretty much the same approach—with the same result of permitting

the political branches of government to go on formulating new policies—was applied in *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982) (permitting a town to enact new welfare legislation, although an earlier consent decree seemed to commit it to a different program in perpetuity, when the due process clause of the Constitution did not lock the town into the choice expressed in the decree). Cf. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 695-97 (7th Cir. 1986) (in banc).

Consider, too, a dispute about using consent decrees to affect the budget. In order to induce Chicago to agree to a school desegregation remedy, the federal government promised financial aid. According to the consent decree, the United States would give Chicago priority in the allocation of available funds. A new Administration in Washington allocated Chicago less than it believed the agreement required, and six years of litigation ensued. We finally concluded that the consent decree should not be read to require automatic funding, or to compel the President to seek additional appropriations, but only to require the Secretary of Education to exercise discretion in good faith within a range preserved by statutes and regulations. *United States v. Board of Education*, 799 F.2d 281 (7th Cir. 1986). We adopted this reading in substantial measure because of concern that judges should not take control of the budgetary process even with the consent of the parties—and we were reluctant to enforce even such a limited commitment except for the fact that the federal government's promise induced Chicago to undertake a program otherwise beyond its means, a program that protected the constitutional rights of children. Take away the detrimental reliance, and the bona fide constitutional claim, and there would have been little support for even the modest control of budgetary priorities reflected in that decree. See 799 F.2d at 297-98. In today's case, by contrast, the decree governs the size and allocation of the City's budget, did not engender reliance, and does not protect anyone's constitutional rights.

Let us turn to a few cases about the entry of consent decrees. Electoral fraud has been a persistent blemish on the political system of Chicago. The Board of Election Commissioners agreed to resolve constitutional litigation by adopting a new regulatory system, including different dates for registration and canvasses, that it believed would reduce the amount of fraud. We held that entry of such a decree would be improvident, because regulation of election procedures should be left to the political process unless a particular procedure is essential to cure an ongoing violation of federal law, and because "[a] federal court must preserve the appropriate relation between state and national power." *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 340 (7th Cir. 1987). And we reminded the public officials of Chicago who tried to enter into this consent decree: "The Commissioners are agents, not principals; they need their principals' approval to alter the terms of their agency. An alteration of the [state's] statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law. The district court therefore properly insisted on a demonstration of at least a probable violation of that law as a condition to the entry of this decree." *Id.* at 342. See also *Dunn v. Carey*, 808 F.2d 555, 559-60 (7th Cir. 1986); *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985). Finding no probable violation of federal law that would be rectified by the parties' agreement, this court held that there was no basis for entering a consent decree. *People Who Care v. Rockford Board of Education*, 961 F.2d 1335 (7th Cir. 1992), similarly insists that the litigants establish a probable violation of federal law before the court may enter a consent decree that affects the rights of third parties. That is a fair description of the consent decree in our case, for a binding promise to pay all tort judgments promptly affects the allocation of the budget. Someone else must wait for payment; alternatively the City must raise taxes (or cut back on other things, such as police or education) to pay all creditors immediately. In any of these cases the

decree affects strangers' interests. See Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321 (1988).

All of these cases illustrate the principle we recognize today: entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law. Unless there is such a claim, the consent decree is no more than a contract, whose enforcement cannot be supported by the diversity jurisdiction and that has in court no more force than it would have outside of court. Accord, *League of United Latin American Citizens*, 999 F.2d at 847. Cf. *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976). Prospective enforcement therefore is "inequitable" within the meaning of Rule 60(b)(5).

Evans I identifies two federal claims: one, under the equal protection clause, which it adjudicated in plaintiffs' favor, and another, under the due process clause, on which it reserved judgment. The decree was properly supported when the district court entered the injunction in 1984. But *Evans II* properly overruled the equal protection holding of *Evans I*, and there can be little doubt that *Evans II* would have repulsed a due process argument had the plaintiffs presented it for decision. The two lines of argument were conceived as complements, and the conclusion of *Evans II* that budgeting to pay tort judgments is a subject for political rather than judicial decision undermines all of plaintiffs' theories.

At the time of *Evans I*, plaintiffs' due process theory was that tort judgments are "property" and that state law calls for prompt payment. Failure to follow state law thus deprived them of the "property" right in prompt payment. Deferring payment indeed is problematic under Illinois law, which requires partial payment if full payment is postponed. 745 ILCS 10/9-104. But litigants aggrieved by Chicago's failure to adhere to state law must take their claims to state court. *Kasper*, 814 F.2d at 340. The Constitution does not authorize federal judges to superintend state and local governments' compliance with their

own laws. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2335 n.8 (1992); *id.* at 2339-41 (Thomas, J., concurring); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 202 (1989); *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *Archie v. Racine*, 847 F.2d 1211, 1215-18 (7th Cir. 1988) (in banc). Quite the contrary, principles of respect for a coordinate sovereign (and in some cases the eleventh amendment) mean that federal courts should refrain from adjudicating claims under state law, whether raised directly or whether used as the springboards for other theories. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). State law may create property interests that give rise to federal procedural entitlements, see *Archie*, 847 F.2d at 1217, but establishing a budget is a legislative rather than a person-specific decision. A government need not offer individual hearings before adopting legislation with widespread effects. *Atkins v. Parker*, 472 U.S. 115, 129-31 (1985).

Instead of contending that the due process clause requires state and local governments to follow their own law, plaintiffs might contend that the disparity between the statutory 6% rate of interest and the market rate of interest means that delay diminishes the value of the judgments, violating the due process clause or, more accurately, the takings clause applied to the states through the due process clause. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). These arguments, too, belong in state court, which may compensate litigants for the erosion in the value of their judgments. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *Gamble v. Eau Claire County*, No. 91-2499 (7th Cir. Sept. 22, 1993).

Recasting the due process argument as an objection to erosion of a judgment's value during delay encounters additional obstacles. State and local law determines the damages awarded in tort litigation under these legal systems.

There would be no constitutional obstacle to a rule saying, for example, that the court shall calculate the income the plaintiff lost because of the defendant's tort and award 80% of that amount as damages. Workers' compensation systems use this principle, and many other rules of law limit the damages recoverable in tort. Limitations on the damages recoverable from state and local governments in tort litigation are common. If a state may reduce the award directly, it may do so indirectly by computing damages at 100% of loss and deferring payment while interest accrues at less than the market rate.

If the statutory interest rate matches the market rate, judgment holders receive full compensation for delay and can sell judgments in the secondary market for their face value, just as people buy and sell 30-year municipal bonds. A court that would not dream of declaring, on constitutional grounds, that a 6% post-judgment interest rate is unconstitutionally low or that a cap on awards in tort cases violates the due process clause has no greater warrant for declaring that the judgment debtor is taking too long to pay; the calculation of the award, the interest rate, and the delay in payment are three facets of the same thing. (The post-judgment rate of interest in Illinois is 6% if the defendant is a unit of local government and 9% otherwise. 735 ILCS 5/2-1303. This difference does not pose any problem under the due process clause, and plaintiffs do not bother to contest it.)

Federal law excluding municipalities from involuntary bankruptcy, 11 U.S.C. §904, may make cities more able (and thus more willing) to defer payment, but a decision by Congress to limit the scope of federal remedies does not justify stretching the due process clause. Some other elements of national law may bear on Chicago's budgetary decisions. State and local governments do not determine the level of damages in cases arising under federal law, which implies a correspondingly reduced entitlement to diminish the value of these awards by delay. Chicago's payment of contract before tort judgments may disfavor

holders of federal judgments (most federal judgments against municipalities rest on 42 U.S.C. §1983 and other civil rights statutes), which might offend the supremacy clause of the Constitution. And if Chicago pays interest on federal judgments at the local rate rather than the federal coupon issue yield equivalent rate, see 28 U.S.C. §1961(a), then Chicago is in hot water under federal statutory law. Cf. *Evans II*, 873 F.2d at 1011 n.7. Plaintiffs do not pursue any of these claims based on the difference between federal and state judgments, however, and the difference could not support the full scope of the relief awarded in this case.

To the objection that our approach interferes with the settlement of litigation, we have two replies. First, settlement is not an end in itself. It is a means of resolving disputes harmoniously. Many things are more important: preserving democratic governance, separating the judicial and political spheres, respecting state autonomy in the absence of a federal rule. These interests may elude a hectored district judge, eager to reach the next case in the queue, but to the political society whose long-term good the judge serves they are vital. Settlements purchased at the cost of putting the court in control of state and local budgets come at too high a cost. Second, the premise is incorrect. Attempts to enforce this consent decree have not produced the peace that settlement brings. There have been 16 years of noisome litigation. See also *United States v. Board of Education*, 799 F.2d at 288-89, 296-98. Politics is unruly and often unpleasant; judicial regulation of political affairs does not end the conflict but only shifts the venue.

Recognizing that a substantial federal claim must undergird a consent decree does not make plaintiffs less willing to settle: the decree still provides relief, which may be tailored more closely to the parties' circumstances than a remedy of the judge's devising could be. Plaintiffs' alternative remains a trial, at which they might lose everything or obtain less suitable relief. From defendants' perspective, the approach we have taken actually may make

settlement more rather than less attractive. Knowledge that a change in the course of judicial decisions permits modification or withdrawal of the decree may make a responsible public official more willing to consent to relief based on the state of the law at the time. Public officeholders whose objectives included ensuring that their policies outlast the terms to which they had been elected will have less reason to settle, but, as we have explained, this is not a proper inducement to resolve litigation.

District judges need a substantial measure of discretion to deal with consent decrees, and with discretion comes deferential appellate review. Nothing in our discussion is designed to detract from these principles. What we have emphasized is a rule of law that the district judges must take into account when deciding which settlements to accept, and when to vacate consent decrees. Unless there is a substantial claim under federal law, the district judge should not enter or continue to enforce a consent decree affecting the operation of a governmental body. The district court did not find that after *Evans II* plaintiffs have a substantial claim under the due process clause, and any such finding would have been legally erroneous. Thus the consent decree must be vacated, and the City's budgetary decisions restored to the political process.

REVERSED

RIPPLE, *Circuit Judge*, concurring.

I concur in the judgment of the court. The plurality opinion writes more broadly than is necessary to decide the case before us, and I believe that it would be prudent for the court to wait until another day when those issues are presented more starkly and more fully than they have been in this case. For the present, it is sufficient to conclude that this court's decision in *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989) (*Evans II*), changed the prevailing law to such a degree as to make

further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 762-64 (1992). Although *Evans II* addressed only the equal protection issue, that was the only issue tendered to the court on appeal by the plaintiffs. Certainly, as the plurality opinion points out, the merits of the due process argument, as presented in earlier stages of the litigation, could not have survived the holding of *Evans II* had it been presented for decision by the plaintiffs. Indeed, given the history of this litigation, it is fair to say that it did not survive. *See Evans II*, 873 F.2d at 1012 n.11. On this basis, I concur in the judgment of the court.

CUDAHY, *Circuit Judge*, with whom CUMMINGS and ROVNER, *Circuit Judges*, join, dissenting.

The plurality opinion flatly rejects the previously unarguable truth that "a deal is a deal" or, more elegantly, *pacta sunt servanda*. The plurality's assertion that Chicago in 1984 did not settle *any* aspect of the merits of this dispute is simply and transparently wrong. Pl. Op. at 6. Any number of sophistical efforts to distinguish municipalities from corporations and to invoke the shibboleths of democracy and federalism do not change the basic fact that a contract has been repudiated with the blessing of this court. The City's promises in 1984 are apparently no longer binding in 1994. The City's promise in 1984 was merely to pay some of its debts promptly. I am unable to see this as a significant assault on federalism or democracy.

The plurality seems to have backwards what was settled in 1984. It says the merits were not settled—only the relief. But by its plain terms the consent decree purported to settle the merits both of the equal protection and of the due process claims. The Consent Decree states unam-

biguously that the "parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspect of the Plaintiff's class complaint, reserving only plaintiff's claim for damages and claims for attorney's fees." Consent Decree at 8. The Consent Decree later indicates that it is "a final and total settlement of all claims [that the plaintiffs] now have or may have in the future, arising either directly or indirectly out of [the Illinois Code], as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees." *Id.* at 10. The merits were therefore settled, while the relief was left to further litigation, ultimately resulting in *Evans II*. The plurality seems to be saying that the merits were not settled because Judge Grady pressed the parties to reach a settlement. Somehow, the one proposition does not follow from the other. In any event, I do not understand the City to be complaining that its arm was twisted.

At the time the settlement was reached in 1984, the City had litigated the equal protection claim and lost. The due process claim, on the other hand, was set aside by this court (although our dicta certainly indicated that the claim was colorable). Hence, if anything was settled under the 1984 decree, it was certainly the due process claim.

With its explication of the transitory quality of settlements with municipalities (e.g. a Harold Washington deal certainly could not bind Richard Daley), Pl. Op. at 7-13, the plurality has put in grave doubt the value of these devices for dispute resolution. In fact, the plurality opinion effectively deprives state and local governments of the ability to enter into enforceable consent decrees. If courts refused to enforce contractual agreements, "people would be reluctant to enter into contracts and the process of economic exchange would be retarded." Anthony T. Kronman & Richard A. Posner, *The Economics of Contract Law* 4 (1979). Where courts are unavailable to enforce promises, those who seek to make binding promises are forced to seek some other, and typically more costly, means of enforcement. *See* John Umbeck, *A Theory of*

Contract Choice and the California Gold Rush, 20 J.L. & Econ. 421 (1978).

Here, there is an obvious candidate to replace a regime of contract law. A district court, recognizing that consent decrees are of doubtful and declining enforceability, would likely issue a permanent injunction, rather than have the city negotiate a (meaningless) consent decree.

The plurality correctly points out that cities may form contracts to build a new road or repay a loan, but insists that governments cannot contract away their power to enact legislation. Pl. Op. at 8. The Consent Decree falls into the latter category, the plurality contends, because it interferes with Chicago's ability to adopt a budget. This assertion simply proves too much, for even a city's agreement to build a road interferes with the city's budgetary process, since a subsequent administration is surely required to honor the bonds that its predecessor sold to finance the construction. Moreover, the agreement we are concerned with here involves an application of constitutional law—something we should think not open to tinkering even by a democratic process. If, as the plurality contends, the word of an elected official is less worthy of trust than almost anyone else's, governmental bodies will simply have to be coerced into compliance instead of invited to make voluntary agreements. It is difficult to understand how this result furthers the ends of federalism.

The plurality is insistent that there is no federal interest in maintenance of the consent decree to the extent that it is based on due process. While the Supreme Court has yet to vacate a consent decree on the grounds that there is an insufficient federal interest, it has suggested that the Constitution implicitly imposes such a limitation on the equitable powers of the federal courts. *See Rizzo v. Goode*, 423 U.S. 362 (1976); Allan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796 (1988). *See also League of United Latin American Citizens v. Clements*, 999 F.2d 831, 898, 900 (5th Cir. 1993) (Politz, J. dissenting & King, J. dissenting) (consent decree settling parties' dispute should be enforced).

In any event, in the case before us there certainly is a federal interest of the highest importance. That interest is, of course, in the enforcement of the Constitution. The facts here, as recited by the plurality, involve tort judgment creditors who had enough political clout to "jump the queue" and receive payment first. This practice alone may violate three or four constitutional provisions. In addition, the original due process claim recognized by the district court in 1981 and affirmed in dicta by this court, *Evans v. City of Chicago*, 689 F.2d 1286, 1296-99 (7th Cir. 1982) ("*Evans I*"), is at least colorable. There is thus a clear federal interest in enforcing the decree. In enforcing the Constitution, federal courts are not meddling in parochial matters lying outside their sphere of responsibility. Nor are they encroaching on the prerogatives of the state. They are instead serving the preeminent function for which they were established. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (ensuring the supremacy of the Constitution is "of the very essence of judicial duty").

The due process claim here as analyzed in our 1982 decision *Evans I*, 689 F.2d at 1296-98, rested in part on a purported property interest in unpaid tort judgments created by an Illinois statute. Apparently the financial practices of the City violated state law as well as, arguably, the Constitution. It is therefore difficult for me to see how the consent decree has offended federalism and democracy. So far as I am aware, no effort has been made to amend the state statutes which, we are told, intruded so onerously on the City's independence.

Finally, I am astonished by the plurality's suggestion that we have announced a "rule of law" for the future guidance of district courts. Pl. Op. at 17. Here, of course, we are violating the basic principle of strong deference to the district court in its construction of its own consent decrees. It does not seem to me that we are announcing a rule of law. It is more like a rule of anarchy. The solemn promises of governments bind only for the day.

They are not to be taken seriously with the turnover of city fathers (not to mention the advent of new faces on the federal courts).

I therefore respectfully dissent.

FLAUM, *Circuit Judge*, with whom KANNE, *Circuit Judge*, joins, dissenting.

I dissent. Although I share the majority's wariness of federal involvement in matters of local governance, I cannot discern any change in legal or factual circumstance since the entry of the consent decree in this case that justifies setting it aside *in toto*.

The original litigation and subsequent decree were bottomed on separate legal theories, equal protection and due process. This Court repudiated the equal protection theory in *Evans II*, but the due process theory was left intact. Perhaps the majority is correct in speculating that the *Evans II* court was in no mood to sustain the due process claim had it the opportunity to pass on it. However, I think it is a wiser practice to limit what we take from a case to what it in fact says, and not to attribute to cases penumbral holdings about wholly distinct and undecided legal theories.

In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in *Evans II* or any other case since alters that conclusion. The district court, intimately familiar with the decree and its foundations, understood the precise import of *Evans II* and acted well within its discretion in modifying the decree accordingly. I also see no inequity at this time in continued enforcement of the decree. Chicago does not complain that compliance has now become onerous and, indeed, even indicates its intention, with or without the decree, to continue to pay tort judgments promptly.

For these reasons, I respectfully dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-3277

SYLVIA EVANS, Administrator of the Estate of ANDREW EVANS, Deceased,

and

BERTHA BALARK, DANA BALARK, ANNE BALARK, and DANE BALARK, by themselves and for all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4119, 79 C 1939, 79 C 2493—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 30, 1992—DECIDED JUNE 3, 1993

Before CUDAHY and EASTERBROOK, *Circuit Judges*, and LEE, *District Judge.*[1]

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[1] The Honorable William C. Lee, United States District Judge for the Northern District of Indiana, is sitting by designation.

LEE, *District Judge.* This is an appeal from a district court order reinstating and modifying a consent decree.

Procedural Background

This case began on November 4, 1977, when plaintiff Sylvia Evans filed suit under 42 U.S.C. §1983 against officers of the City of Chicago. In this suit, Evans claimed that the City's practice of paying small tort judgments before large ones regardless of the dates on which the judgments were entered, and the City's practice of delaying payment of large tort judgments, violated the Equal Protection and Due Process clauses of the United States Constitution. The City of Chicago was later added as a defendant, and the case was certified as a class action on January 2, 1980. On May 14, 1979, plaintiffs Bertha Balark, Dana Balark, Anne Balark, and Dane Balark filed suit under 42 U.S.C. §1983 against the City of Chicago and certain of its officers asserting similar violations. The *Balark* case was certified as a class action on August 15, 1980. On June 18, 1979, plaintiff Curtis Collum also filed suit under 42 U.S.C. §1983 against the City of Chicago and certain of its officers, asserting similar violations of the United States Constitution. The *Collum* case was also certified as a class action on August 15, 1980. On January 28, 1981, the district court consolidated these cases. However, the *Collum* class is not a party to this appeal.

The class certified in *Evans* consisted of persons holding large judgments against the City who had not been paid within the first two fiscal years after the entry of their judgments. *Evans v. City of Chicago*, 689 F.2d 1286, 1290 n. 6 (7th Cir. 1982) ("*Evans I*"). The class certified in *Balark* consisted of persons holding large unpaid judgments against the City, which judgments were less than two years old. *Id.* at 1291 n. 7.

On January 28, 1981, the district court entered partial summary judgment in favor of the *Evans* and *Balark* plaintiff classes and against the defendant City of Chicago, and certified its order for immediate appeal under Rule

54(b) of the Federal Rules of Civil Procedure. The district court's order (1) directed the City to pay all members of the *Evans* class immediately; (2) declared that Ill. Rev. Stat. ch. 85 para. 9-104(b) (1981), violated the Due Process clause of the United States Constitution;[2] (3) specified procedural safeguards to be followed before the City could properly pay judgments in installments; (4) ordered small judgments along with judgments over $1000 to be paid in the order in which they were entered; (5) declared that Ill. Rev. Stat. ch. 24, para. 8-1-16 (1981), violated the Equal Protection clause of the United States Constitution; (6) reserved the question of attorney's fees; and (7) certified the order for immediate appeal under Rule 54(b). The City of Chicago filed a timely notice of appeal from the district court's judgment.

This Court affirmed the district court's judgment on September 27, 1982, stating as follows:

> The defendants contend that the City's practice of paying tort judgments of $1,000 or less before tort

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[2] The 1981 statute provided:

> (a) If a local public entity does not pay a tort judgment or settlement during the fiscal year in which it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing year.
>
> (b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment.

Ill. Rev. Stat. ch. 85, para. 9-104 (1981). Effective November 25, 1986, paragraph 9-104 was amended by P.A. 84-1431.

> judgments in excess of $1,000 related rationally to the City's attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large amount of nuisance litigation. The explanation does not survive examination for two reasons. First, the City's practice included immediate payment of fully litigated claims which resulted in judgments of $1,000 or less. Second, the practice did not reduce interest costs since interest accumulated on the sum of the unpaid judgments. The priority given smaller judgments did not reduce that total. Nor does the payment of many small judgments before an equal amount due on large judgments allow the City more effectively to manage its yearly appropriations and limit the City's debt. We discern no rational basis for the City's challenged classification. *See Zobel v. Williams*, ____ U.S. ____, ____, 102 S.Ct. 2309, 2311, 72 L.Ed.2d 672 (1982). The district court correctly held the practice and Ill.Rev.Stat., ch. 24, § 8-1-16, insofar as the statute incorporates the practice, unconstitutional. (Footnote omitted.)

Evans I, 689 F.2d at 1299-1300.

With respect to the due process challenge to paragraph 9-104(b), this Court ruled that:

> Upon review of the relevant statutes and decisions, we agree with the district court that under Illinois law, if the City has not invoked § 9-104(b) before the end of the fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law.
>
> * * *
>
> The record discloses that the governing body of the City never determined that undue hardship would arise if the entire amount of unpaid judgments were paid

> out of revenues for the fiscal year following the fiscal year in which the judgments became final. Furthermore, the City never subjected the named plaintiffs or any class member to the installment plan method of payment permitted by Ill.Rev.Stat., ch. 85, § 9-104(b). Nor did the City ever tell the named plaintiffs or any class member that it would implement such a plan. Thus the plaintiffs had no standing to attack the constitutionality of that provision. *Blum v. Yaretsky*, ____ U.S. ____, ____, 102 S.Ct. 2777, 2783, 73 L.Ed. 2d 534 (1982); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Because the district court improperly reached this issue, we vacate paragraph four of the district court's January 28, 1981 order, which declared Ill. Rev.Stat., ch. 85, § 9-104(b) unconstitutional and set forth the minimum procedural safeguards that due process requires before the City may decide to pay a judgment in installments over ten years. In vacating this portion of the court's order, we, of course, express no opinion about the constitutionality of the statute or the appropriateness of the order's procedural safeguards.

Id. at 1297, 1299.

The case returned to the district court for further proceedings. Subsequently, the parties entered into negotiations and on May 30, 1984, Judge Grady approved a consent decree. This decree stated in part:

III.

PURPOSES OF CONSENT DECREE

> 1. The parties state that they are entering into this Consent Decree for the purpose of avoiding the further expense of protracted litigation over the matters resolved and decided by this Consent Decree. The parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspects of Plaintiffs' class complaint, reserving only plaintiffs'

claims for damages and claims for attorneys' fees. All equitable and legal rights of the plaintiffs are merged into this Consent Decree unless otherwise specified.

5. In consideration of the execution of this Consent Decree, the Defendants, CITY OF CHICAGO, et al., and the Plaintiffs as class representatives, hereby covenant and agree to abide by the Terms of Settlement described in this Consent Decree, thereby fully settling all matters decided therein. The parties, as indicated by the signatures of their counsel below, who are acting with express authority from their respective clients, have determined to finally settle Plaintiffs' claims as described herein by entry of this consent decree subject only to notice to the class and hearing on January 9, 1983 to determine whether the proposed settlement as provided by this Consent Decree should be approved by the court under Rule 23(e) of the Federal Rules of Civil Procedure.

IV.

TERMS OF SETTLEMENT

1. In consideration of the execution of this Consent Decree and the Release herein contained, and in consideration of the dismissal of this lawsuit in all respects, with prejudice and without costs and/or attorneys' fees, against Defendants CLARK BURRUS, Defendant DANIEL GRIM and Defendant WILLIAM QUINLAN, individually and as past Comptrollers and Corporation Counsel, respectively, of the City of Chicago, Defendant CITY OF CHICAGO hereby covenants and agrees to do the things and perform the acts described herein, at the time and in the manner set forth in this Decree, all of which shall be subject to the conditions set forth herein.

* * *

3. Plaintiffs understand, upon advice of counsel, and agree that except as otherwise provided herein, this Decree is a final and total settlement of all claims

they now have or may have in the future, arising either directly or indirectly out of or related to Ill. Rev. Stat. 1981, ch. 85 §9-104 and Ill. Rev. Stat. 1981, ch. 24 §8-1-16, as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees, as hereinafter specified; and that such finality is applicable to the defendants, the City of Chicago, and its officers, agents and employees.

* * *

5. The Defendant CITY OF CHICAGO, its agents, servants and employees are permanently enjoined from paying final judgments other than by the date of their entry by a court of competent jurisdiction.

. . .

* * *

7. For fiscal 1984, the Defendant CITY OF CHICAGO shall appropriate an amount which is expected to be sufficient to satisfy payment of all final judgments which remain unpaid as of December 31, 1983, plus payment of one-half of the estimated liability of the CITY OF CHICAGO for payment of judgments to become final in 1984. In no event shall Defendant CITY OF CHICAGO appropriate less than Thirteen Million Five Hundred Thousand ($13,500,000) Dollars for the payment of judgments in 1984.

8. For fiscal 1985, the CITY OF CHICAGO shall appropriate an amount which is expected to be sufficient to satisfy payment of the full "anticipated liability" of the CITY OF CHICAGO for fiscal 1985. In no event shall defendant CITY OF CHICAGO appropriate less than Twelve Million ($12,000,000) Dollars for the payment of judgments in 1985.

9. For all subsequent fiscal years, the Defendant CITY OF CHICAGO shall submit to the City Council a request for an appropriation of monies sufficient to satisfy payment of the full "anticipated liability" of the CITY OF CHICAGO for payment of judgments for the ensuing fiscal year.

10. Process of tort judgments entered against the CITY OF CHICAGO, its agents, servants and employees thereafter, shall be administered in the following manner:

* * *

(f) Payment of judgment creditors from the date of entry of this Order until May 31, 1985 shall be made when funds become available for payment. Sums budgeted for 1984 and 1985 shall be made available for disbursement in ten (10) monthly installments for each month from March through December of that year.

11. Payment of tort judgments entered against the CITY OF CHICAGO, its agents, servants and employees beginning June 1, 1985 and for subsequent years thereafter shall be processed in the following manner:

(d) . . . Effective June 1, 1985, the Office of the Comptroller shall issue a check in payment of judgments within forty-five (45) days of receipt of all executed documents.

12. In the event that all funds allocated for the payment of tort judgments have been exhausted, the time restrictions of paragraph 10 with respect to payment of tort judgments shall be suspended until such funds become available. All other provisions in paragraph 10 shall remain in full force and effect. When additional allocated funds become available for payment of tort judgments, all judgments due to be paid during the suspension period for which the proper documentation has been provided shall be paid immediately.

After the entry of the Consent Decree, trial commenced in the district court on the damages issue. At trial, the plaintiffs introduced a new theory of equal protection liability, arguing that the City irrationally chose to delay payment of tort judgments while paying other types of judgments (such as contract claims) immediately. Plaintiffs

also reasserted their due process argument. The district court found in favor of the plaintiffs on their new equal protection claim, but did not address the due process claim. Final judgment was entered against the City of Chicago on November 23, 1987. Again, the City of Chicago appealed to this Court, and on April 27, 1989, we reversed the district court and also reversed our ruling in *Evans I*. *Evans v. City of Chicago*, 873 F.2d 1007, 1012-13 (7th Cir. 1989) ("*Evans II*"). We explained our reversal of *Evans I* as follows:

> [I]t is clear that the classification system set up by the City [for paying judgments] should not be struck down by this court. The City offered a number of reasons for its classification system. Most importantly, at the second trial the City argued that paying off smaller judgments early satisfied more claimants; without such a bifurcation of payments, all tort judgment creditors would have experienced lengthy delays. The district court found that the purpose of satisfying more claimants was invalid. However, we find nothing to indicate that such a goal is impermissible. The purpose behind a government enactment need not be laudatory—to pass constitutional muster, the purpose must simply be legitimate. If the court can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980). Vicious or irrational discrimination violates the equal protection clause. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984). No such discrimination is evident in this case. At worst, the City is merely attempting to satisfy as many individual claimants as possible with the limited revenues available. The City's practice of paying small tort

> judgments in advance of larger ones does not violate the equal protection rights of the holders of large tort judgments. This court's finding in *Evans I* that the City's practice violated equal protection was clearly erroneous and must be reversed.

Evans II, 873 F.2d at 1016.

With respect to the plaintiffs' new equal protection theory, we held that:

> In reviewing this holding by the district court [that the City's differentiation between tort and nontort judgments was irrational], we must again apply the rational basis test of equal protection to the City's practice. Under this standard, the City's budgetary scheme does bear some rational relationship to legitimate state ends. The City's practice of charging judgments incurred by enterprise funds to those funds seems rationally related to the concept of such a fund—a self-sustaining or breakeven operation supported by its users. Charging departmental budgets for contract damages conforms to the normal accounting practice of matching expenditures to the appropriate entity that incurred the liability. Similar rational reasons exist for charging personnel damages to the involved department. The 395 Fund is by law a special revenue fund and can only be used for its defined purpose.
>
> The district court found fault with this system and while it may not be perfect, we do not believe that it sinks to the level of being irrational.

Id. at 1017.

Once again the case returned to the district court, where the plaintiffs' motions for attorney's fees were pending. The plaintiffs argued to the district court that, despite their defeat in *Evans II*, they were still the "prevailing parties" for purposes of the attorney fee provision of 42 U.S.C. §1988, as they had prevailed in negotiating a consent decree which remained in effect. Plaintiffs' argument prompted the City to move to vacate the consent decree

under Rule 60(b)(5) of the Federal Rules of Civil Procedure. The district court granted the City's motion to vacate the consent decree on October 31, 1990 and also denied plaintiffs' petition for attorney's fees.

On November 28, 1990, the plaintiffs moved for reconsideration and on July 25, 1991, the district court, in a bench ruling, reversed its earlier ruling vacating the consent decree and granted in part the motion for reconsideration. Judge Grady explained the basis for his reversal as follows:

> These statements which I have just quoted from my order vacating the consent decree were based upon a misinterpretation of the facts of this case and a misapprehension as to the timing of certain critical events. I emphasized in my order vacating the consent decree that the Court of Appeals in Evans II had said that the due process issue had not survived in the case to the point of the decision in Evans II; namely, 1989. Evans II said nothing whatever about what the status of the due process claim was back in 1984 at the time the consent decree was negotiated and agreed to by the parties except to say in several places that the due process questions considered in Evans I were not before the Court in Evans II. Evans I had not decided the question of whether the City's customary delay in the payment of judgments was a violation of due process. That question was explicitly left open by Evans I. It was not decided by Evans II as is made abundantly clear by Footnotes 8, 11, and 15 of Evans II.
>
> In saying, as I unfortunately did in my order vacating the consent decree, that all legal underpinning for the consent decree had been eliminated by Evans II, I was overlooking the fact that the language in Evans II about the elimination of the due process issue from the case was not addressed to the situation that existed at the time of the entry of the consent decree.

Transcript of July 25, 1991 hearing at 9-10.

On August 2, 1992, Judge Grady entered an "Order Modifying Consent Decree" which stated:

> The court having granted in part and denied in part the motion of the defendant City of Chicago to modify the Consent Decree of May 31, 1984, the said decree is hereby modified as follows: Nothing in the Consent Decree shall require the defendant City of Chicago to pay a final tort judgment under $1,000.00 in any particular order.

On August 8, 1991 the City moved the district court to reconsider its order. On September 9, 1991, the district court denied the City's motion for reconsideration, and on September 30, 1991, the City of Chicago filed its notice of appeal.

Standard of Review

In a case involving a Rule 60(b)(5) request to modify or vacate a consent decree, the standard of judicial review is deferential. *Duran v. Elrod*, 760 F.2d 756, 761 (7th Cir. 1985). Thus, the district court's determination may be reversed only upon an abuse of discretion and appellate review is limited. *Reinsurance Co. v. Administratia Asigorarilor*, 902 F.2d 1275, 1277 (7th Cir. 1990); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986).

Discussion

Appellant City of Chicago contends that, pursuant to Rule 60(b)(5), the consent decree should be modified to respond fully to changes in legal and factual circumstances. The City argues that it changed its practices, as memorialized in the consent decree, to conform with the law as announced in *Evans I*, and now that this Court has repudiated *Evans I* the consent decree should be vacated as it is clear that no part of the City's former practices violates the equal protection clause.

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

The Supreme Court, in *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 758 (1992), recently reinforced its holding in *Railway Employes v. Wright*, 364 U.S. 642, 647-48 (1961), that: "There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."

The City contends that the legal circumstances in this case have changed. Specifically, the City asserts that the judgment upon which the consent decree was based, *Evans I*, has been overruled by this Court in *Evans II*. Plaintiffs, however, claim that *Evans II* only reversed the equal protection holding of *Evans I*, and the consent decree was based on the alleged due process violations as well as the equal protection violations. The record is clear that the due process issues were not before this Court in *Evans II*, but were completely settled by the parties after *Evans I* was decided and prior to the City's appeal of the district court's ruling in favor of plaintiffs on their new equal protection claim. Although the due process issues were before this Court in *Evans I*, we declined to address the issues due to the plaintiffs' lack of standing to raise the issues. It is clear that we did not rule on the due process issues, and thus had no ruling to reverse on this point in *Evans II*. Likewise, it is clear that both parties agreed to settle the due process issues, as

set forth in detail in the consent decree.[3] Therefore, the City's assertion that the judgment upon which the consent decree was based has been reversed is not completely correct as there was no judgment on the due process issues. The Court understands the City's point that since it lost on the equal protection claim, it felt it had no choice but to settle the case. Nevertheless, the City did have a choice in how it structured the settlement and it could have reserved some or all of the due process issues for further litigation. The City lost on the equal protection claim, predicted it would lose on the due process claims if it pursued the matter, and decided the wisest course was to enter into the consent decree. At the time the consent decree was entered into no one could have very well predicted that, as a result of additional evidence before the district court during the trial on damages, the equal protection holding would be appealed and reversed. As a result, although the City is bound by the decree, it is no longer obligated to pay damages to several large classes of plaintiffs since the damages award, based on the equal protection holdings, was reversed in *Evans II*.[4]

This Court can find no competent basis for vacating the decree in its entirety and finds that Judge Grady's modification of the decree is a proper resolution of the conflict arising out of this Court's reversal of the equal protection holdings. Although the City argues that Ill. Rev. Stat. ch. 85, para. 9-104(a) can withstand both substantive and

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[3] At oral argument, the Court queried whether the agreement the parties entered into was a consent decree or, rather, simply an agreement on relief after a judgment on the merits. Counsel for both parties assured the Court that the agreement was indeed a consent decree. After further considering the issue, the court agrees that the document is a consent decree since there was not a judgment on the merits on the due process claims. The due process claims were settled in the consent decree.

[4] Neither party appealed the district court's finding that it need not reach the question of whether plaintiffs were entitled to damages based upon a due process violation.

procedural due process challenges, the constitutionality of §9-104(a) is not properly before this Court. Furthermore, the City cannot now litigate an issue that was subsumed in the consent decree, which the City agreed was final and applicable to it. *Money Store, Inc. v. Harriscorp Finance, Inc.*, 885 F.2d 369 (7th Cir. 1989).

The City argues that the district court erred in modifying the consent decree to reflect the narrowest possible reading of this Court's prior decisions. However, as discussed above, in the absence of a judgment on the due process issues, the district court had no other choice. The district court correctly granted relief from the consent decree to the extent that *Evans II* overruled *Evans I* on the equal protection holding.

The City also condemns the district court's decision by stating that a federal judgment still has effect even though it has not been shown that any law has ever been violated. The Court observes that this is true in most cases that settle. Most judgments arising from settlements are based on the agreement of the parties and not on a showing that a law has been violated. The purpose of a settlement agreement, or a consent decree, is to end a case without having to go through the trouble and expense of deciding whether a law has been violated. If the City had entered a consent decree prior to any litigation, thereby aborting the birth of *Evans I* and its siblings, the City would remain bound by the decree, absent a substantial change in legal or factual circumstances, even though it may later have believed that it unwisely entered into the decree. The City further complains that, by refusing to vacate the consent decree, the district court penalized it for having agreed to the entry of the decree rather than proceeding with litigation. Yet this is true in every case that settles—one party is being penalized in the sense that there is always the chance that one side can completely win their case if litigation continues.

Although we agree that consent decrees should be modified or vacated when the circumstances so warrant, we

are mindful of the teaching of our Supreme Court in *Rufo*, 112 S.Ct. at 760, that "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." Further, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree" and then "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* In the present case, the significant change in circumstances was a legal change rather than a factual change. The legal change was the ruling that the City's practice of paying tort judgments less than $1000 prior to judgments over $1000 did not violate the equal protection clause. The district court modified the decree to provide that the City could pay a tort judgment under $1000 in any order it wished. This modification is clearly suitably tailored to the changed circumstance. It is worth noting that Judge Grady gave the parties ample opportunity to submit an agreed upon proposed order modifying the decree. The City was apparently unable to reach an agreement and should not now complain so loudly that Judge Grady's modification is too narrow. Further, although the City is bound to the due process aspects of the consent decree, the procedures the City must follow in paying judgments have not been adjudged to be illegal. This is in keeping with the Supreme Court's ruling that a decree modification must not "create or perpetuate a constitutional violation." *Rufo*, 112 S.Ct. at 763. *Rufo* further held that:

> A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final

> judgment that may be reopened only to the extent that equity requires. The court should not "turn aside to inquire whether some of [the provisions of the decree] upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition." *Swift*, 286 U.S., at 116-117, 52 S.Ct., at 463.

Id. at 764.

The City suggests to the Court that "to encourage settlements, a court considering changes in legal circumstances should construe them to be far-reaching changes, and thus grant relief from consent decrees freely," and that "to allocate the risk of future changes in the law to the obligor under a consent decree, without realistic hope of relief, is to discourage potential obligors from entering into settlements in the first instance." The City is grossly overstating the case. First of all, it would be an extremely poor judicial policy to freely grant relief from consent decrees and certainly would not encourage settlements. Secondly, there has been no change in the law to which the City has not been granted relief. The decree has already been modified to account for the change in the law and the City has been relieved from paying damages.

The City relies on the following passage from *Rufo* in support of its argument that the federal courts should relinquish control over the management of the City's fisc:

> Within these constraints, the public interest and "[c]onsiderations based on the allocation of powers within our federal system," *Dowell*, 498 U.S., at ____, 111 S.Ct., at 632, require that the district court defer to local government administrators, who have the "primary responsibility for elucidating, assessing, and solving" the problems of institutional reform, to resolve the intricacies of implementing a decree modification. *Brown v. Board of Education*, 349 U.S. 294, at 299, 75 S.Ct. 753 at 755-756, 99 L.Ed. 1083 (1955). See also *Missouri v. Jenkins*, 495 U.S. 33, ____, 110 S. Ct. 1651, ____, 109 L.Ed.2d 31 (1990); *Milliken II*,

> 433 U.S., at 281, 97 S.Ct., at 2757. (Footnote omitted.) Although state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation, a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree. To refuse modification of a decree is to bind all future officers of the state, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion.

Id.

It is clear to this Court that to continue to require the City to abide by the terms of the consent decree will not work a hardship on the City. The City admits that it has fully complied with the consent decree for eight years and has no intention of reverting to its prior practices, as it does not wish to ever again pay more post-judgment interest on its tort judgments than is absolutely necessary. The City argues that the interests of the taxpayers of the City of Chicago should also be considered in determining where the public interest lies, and their interests may not always dictate immediate payment. The City seems to have forgotten that the consent decree is very flexible and provides that:

> 6. Nothing in this decree is intended to prevent the parties to a suit from entering into a structured settlement, or a final settlement which assumes periodic payment of sums of money over a period of time established by the settlement, provided that such settlement is in good faith compliance with the terms of this Consent Decree and subject to the approval of the court before whom the case is pending.
>
> * * *
>
> 12. In the event that all funds allocated for the payment of tort judgments have been exhausted, the

> time restrictions of paragraph 10 with respect to payment of tort judgments shall be suspended until such funds become available. All other provisions in paragraph 10 shall remain in full force and effect. When additional allocated funds become available for payment of tort judgments, all judgments due to be paid during the suspension period for which the proper documentation has been provided shall be paid immediately.

This flexibility fatally undermines the City's argument that the decree should be vacated because it robs the local government of necessary flexibility. For example, pursuant to Paragraph 6 above, if the City cannot afford to immediately pay a judgment in full, it may settle for whatever the judgment holder is willing to accept, such as higher interest. This alternative is certainly more justifiable than expecting the judgment holder to settle for less than he is entitled to (if he sells his judgment at a discount) or forego payment for years.

The City has suggested that if the Court finds vacatur of the decree unwarranted, the Court should remand the case back to the district court for a decision on the merits of the due process claims. The Court rejects this suggestion for two reasons. First, this case has been in Judge Grady's court since November of 1977 and Judge Grady has conscientiously managed the case since that time. A review of the record in this case proves without a doubt that Judge Grady understands the case better than anyone else. His order modifying the decree conforms with the law, and while it may be argued until the end of time that *Evans II* could be read more broadly than Judge Grady chose to read it, by no stretch of the imagination can his decision be held to be an abuse of discretion. Second, a remand is likely to give rise to *Evans IV*, and possibly to *Evans V*, if plaintiffs continue to pursue their claim for attorney fees. Simply stated, this case should come to an end as soon as possible.

Accordingly, for all the foregoing reasons, the District Court's opinion is hereby AFFIRMED.

EASTERBROOK, *Circuit Judge*, dissenting. In 1982 we held that the sequence in which Chicago paid tort judgments against it violated the equal protection clause of the fourteenth amendment. On remand in 1983 the parties agreed on the prospective relief required by that decision but not on damages. On appeal from the damages judgment in 1989, we overruled our 1982 opinion. Chicago asked to be relieved of the prospective relief as well, now that its foundation is gone. A majority of this third panel holds that Chicago is forever bound to carry out relief designed to implement our overruled decision. This carries respect for the dead hand of the past altogether too far. Having admitted in 1989 our mistake of 1982, we should relieve the parties of the consequences.

I

During the late 1970s and early 1980s, the rate of interest Chicago paid on judgments (6% per annum for municipal governments, Ill. Rev. Stat. ch. 110 ¶2-1303) was substantially less than the cost of voluntary credit. Judgment debtors had every reason to postpone payment as long as this imbalance persisted. Instead of borrowing in the market at 15%, or raising taxes, Chicago borrowed from its judgment creditors. It paid tort judgments of $1,000 or less, and all contract judgments, quickly. Any plaintiff "lucky" enough to recover more in tort litigation could whistle for his money. By 1979 plaintiffs without the political clout to jump the queue had to wait on average 47 months for payment. An active secondary market in judgments against Chicago developed. About 80% of judgment holders sold in this market, accepting a discount of approximately 25% off the face value of their awards. *Evans v. Chicago*, 689 F.2d 1286, 1290 (7th Cir. 1982) (*Evans I*).

The district court held that Chicago's practice of paying small judgments quickly while deferring payment of larger tort judgments violated the due process and equal protection clauses of the fourteenth amendment: due pro-

cess because it deprived judgment holders of a "property" interest in immediate payment created by state law, and equal protection because there was no rational basis for distinguishing large from small awards. A panel of this court affirmed the portion of the judgment that rested on the equal protection clause, *id.* at 1299-1300, while vacating the due process aspect as premature, *id.* at 1296-99. Dicta in the opinion strongly imply that the City deprived the plaintiffs of due process of law, *id.* at 1297-98.

On remand the parties proposed, and the district court approved, a consent decree eliminating the distinction between large and small judgments, requiring all judgments to be paid in order of their entry, and providing that the Mayor must ask the City Council to appropriate enough money to pay all judgments promptly. The litigants could not agree whether the plaintiffs were entitled to damages for delay in payment. The district court concluded that they were, under the equal protection clause—both the plaintiffs and the district court deeming the due process theory surplusage in light of the equal protection holding. Another panel of this court reversed, overruling *Evans I*. 873 F.2d 1007 (7th Cir. 1989) (*Evans II*). The second panel (with the acquiescence of the full court, see *id.* at 1008 n. *) concluded that the City had a rational basis, if only administrative convenience and the placation of the more numerous holders of small awards, to pay little judgments before big ones. *Id.* at 1015-18. The second panel wrapped up: "The district judge advanced some worthy ideas, but they are for the City's self-determination, and will not be imposed by this court. It is regrettable that this matter which has lingered so long now takes a new and possibly unexpected turn, but what we now view as error must be arrested even at so late a date. Improvements in this situation are better left to the state and municipal governments." *Id.* at 1017-18.

Delay in paying judgments is no different in principle and in consequence from a low interest rate on judgments. If the statutory interest rate matches the market rate, judgment holders receive full compensation for delay and

can sell judgments in the secondary market for their face value, just as people buy and sell 30-year municipal bonds. A court that would not dream of declaring, on constitutional grounds, that a 6% post-judgment interest rate is "too low" has no greater business declaring that the judgment debtor is taking "too long" to pay; the interest rate and the delay in payment are two facets of the same thing.

Chicago's practice has its legal problems, to be sure. Illinois law appears to forbid a city to put off its creditors as Chicago did. Ill. Rev. Stat. ch. 85 ¶9-104. Chicago's payment of contract before tort judgments may disfavor holders of federal judgments (most federal judgments against municipalities rest on 42 U.S.C. §1983 and other civil rights statutes), which may offend the supremacy clause of the Constitution. And if Chicago pays interest on federal judgments at the local rate rather than the federal coupon issue yield equivalent rate, see 28 U.S.C. §1961(a), then Chicago is in hot water under federal statutory law. Cf. *Evans II*, 873 F.2d at 1011 n.7. But none of this has anything to do with the due process and equal protection clauses, notwithstanding the intimations in *Evans I* that by violating state law Chicago violated the due process clause. See *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *Archie v. Racine*, 847 F.2d 1211, 1215-18 (7th Cir. 1988) (in banc).

Taking us up on the proposition in *Evans II* that "[i]mprovements in this situation are better left to the state and municipal governments", Chicago asked the district judge to vacate the injunction requiring sequential payment of judgments and compelling the Mayor's budget to include the funds for their prompt satisfaction. Rule 60(b)(5) of the Rules of Civil Procedure speaks directly to the situation, permitting relief from judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated". The injunction was based on *Evans I*, which has been overruled. Interest rates too have changed; today the legal rate approximates the market rate, so Chicago pays promptly. Still, it wants to redeem its governmental powers, now in hock in a district court.

Judge Grady, who has presided over this case since its inception, refused to vacate the decree. He conceded that *Evans II* pulled the rug out from under the equal protection theory. But, the judge observed, *Evans II* did not address the due process theory, deeming it abandoned, 873 F.2d at 1012 n.11, 1018 n.15. The consent decree did not specify a legal foundation and therefore did not rule out the possibility that Chicago was compromising the due process claim rather than yielding to the equal protection holding of *Evans I*. So after making a trivial change in the decree the judge reiterated that the City remains obliged to pay all judgments in order, and quickly. (The change the judge made, knocking out the portion of the decree forbidding Chicago to distinguish judgments according to size, is nugatory because of the separate provision in the injunction compelling the City to pay judgments strictly in order of their entry.)

II

Chicago has prevailed on the merits of this case, and still it loses. An injunction intrudes into the internal operations of the City, telling the Mayor what items must be in the annual budget. *Evans II* said bluntly that, although changes may be beneficent, the political rather than the judicial process is responsible for the subject. The district court nonetheless held, and a majority of this third panel agrees, that the judicial compulsion may continue. How can this be? Recently the Supreme Court told district judges that they must reexamine consent decrees when changes in the legal landscape erode their footings. *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992). Here we have not a change in legal doctrine with uncertain effects on the case at hand, but the overruling of the decision in this very case. The decree was founded on a blunder committed by this court. *Evans I* has been overruled, yet through the injunction *Evans I* lives on.

If the plaintiffs' due process claim really were independent of their equal protection claim, and if the parties

really settled the case rather than settling their disagreement about the injunctive relief to which *Evans I* entitled the plaintiffs, then there would be reason to think the consent decree *Rufo*-proof. The majority never discusses the first of these conditions, and it addresses the second only in a footnote. Footnote 3 asks whether the injunction was based on a consent decree; answering "yes," my colleagues think the inquiry over. Yet the question is not whether there was a "consent decree." Surely there was. The question is what aspects of the decree rest on the parties' consent rather than *Evans I*. No one believes that the decree settled "the case." Plaintiffs wanted damages. The City refused to pay, and after issuing an injunction the district judge held a trial on damages. Chicago appealed from an adverse decision, leading to *Evans II*. No, there was no global settlement. What issues, then, did the parties compromise? All the decree addresses is prospective relief. And this is all the parties settled—the relief, not the merits. Chicago "agreed" to do what *Evans I* implied that it must do. " 'Consent' that is no more than knuckling under to the inevitable is more like an adjudication than a contract." *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1338 (7th Cir. 1992), quoted in *United States v. Chicago*, 978 F.2d 325, 333 (7th Cir. 1992). Once again consider the significance of *Evans II*. If the parties indeed compromised the merits, what was the City doing asking us to overrule *Evans I*? Plaintiffs did not contend that through the consent decree Chicago bargained away its right to challenge the legal foundations of their position. If, as *Evans II* demonstrates, there has been no settlement of the merits, then nothing inhibits the court from erasing all vestiges of *Evans I*.

All that remains is the possibility that the due process theory is independent of the equal protection theory, so that *Evans II* does not undermine one sufficient theory for relief—a theory on which the parties may have reached a compromise. It makes sense to understand the decree as a settlement of a due process claim only if that claim supported additional relief, for otherwise it was super-

fluous. If *Evans I* sufficed to condemn the City's approach to paying judgments, the parties had no need to settle the due process claim. They could ignore it—because the judge was *legally bound* to ignore it! Once a decision on one claim resolves the case, a judge has no business under Article III of the Constitution issuing advisory opinions about additional legal theories. If the judge would not, *could not*, adjudicate a claim, and would award identical relief with or without that claim, it is foolish to treat a consent decree as resolving or resting on, let alone settling, that claim.

Judge Grady told the parties in no uncertain terms that *Evans I* resolved the merits, and that nothing remained but to select the appropriate relief. When Chicago bridled, the judge announced from the bench on October 26, 1983:

> Now, I have got to have an order from the City and the plaintiffs. I have got to have an agreed order that will bind the City to pass a budget sufficient to pay tort judgments.
>
> * * *
>
> If by November 25th, approximately a month from now, I do not have in my hands an agreed order that calls upon the City and requires the City to budget annually an amount sufficient to pay tort judgments along the lines which we have been discussing in great detail at our recent and not so recent conferences in chambers, then I am going to go ahead and enter my own order.
>
> * * *
>
> I see no need for any further conferences with counsel that go to basic philosophy or go to what I have been saying this afternoon. If there is some mechanical thing you want to talk about that I can help you with, I will be happy to sit down, but just to rehash this question about whether we are going to do something in this case that the Court of Appeals ordered done a long time ago, the time for discussion has passed.

Judge Grady unequivocally told the parties that *Evans I* compelled Chicago to appropriate the money to pay all judgments promptly—that *Evans I* dictated *what* to do, but not *how*. Only mechanical details remained for decision. And the details of prospective relief are all the parties compromised. The merits were not settled. They were litigated, twice. The City lost in *Evans I* and won the rematch in *Evans II*.

Plaintiffs themselves saw things that way until recently. During the trial on damages, plaintiffs jettisoned their due process theory. When Chicago appealed from the award of damages, plaintiffs did not urge the due process theory in defense of their judgment. That is why we remarked in *Evans II* that the "due process claim has not survived to this stage of the litigation." 873 F.2d at 1018 n.15. At oral argument before this third panel, counsel for the plaintiffs said that he let the due process theory drop because it was redundant.

If neither plaintiffs nor the district court attached any independent significance to the due process theory, if both believed that *Evans I* compelled Chicago to pay all tort judgments promptly, then it is unwarranted for us to proclaim that Chicago, unbeknownst to its own officials, "settled" this fugitive claim in 1983, putting the injunction beyond recall.

Lightning bolts of this kind disserve principles of federalism and in the long run work against the interests of the judicial system itself. In the future, prudent counsel will insist on litigating stray issues, lest an appellate court a decade later declare that in recognizing that a claim no longer mattered counsel sabotaged his client's rights. Or perhaps counsel will lard consent decrees with reservations and provisos, "clarifying" what is being settled and what is not, even though nothing then is in need of clarification. Worst of all, we might induce counsel to refuse to compromise on relief, lest such compromises be deemed to include the merits. Can you imagine Judge Grady's reaction if on November 25, 1983, Chicago's lawyers had

told him that the City was refusing to accept relief of any kind, because it feared that this step would keep the Mayor and City Council in shackles if the law should change in the future?

Counsel seeking to maximize the City's ability to capitalize on legal developments might have done one of these things. Whatever the penalty for counsel's drafting choices should be, it is not a perpetual transfer of budgetary powers from state and local government to federal court. In treating this consent decree the same way they would treat the compromise of a private dispute over a contract to deliver two tons of rhubarb, the majority not only perpetuates the error of *Evans I* but also offends principles separating political from judicial roles in government.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated August 2, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SYLVIA EVANS, et al.,
Plaintiffs,
v. No. 77 C 4119
CITY OF CHICAGO, et al.,
Defendants.

BERTHA BALARK, et al.,
Plaintiffs,
v. No. 79 C 1939
CITY OF CHICAGO, et al.,
Defendants.

CURTIS CULLUM, et al.,
Plaintiffs,
v. No. 79 C 2493
CITY OF CHICAGO, et al.,
Defendants. Consolidated Cases

ORDER MODIFYING CONSENT DECREE

The court having granted in part and denied in part the motion of the defendant City of Chicago to modify the Consent Decree of May 31, 1984, the said decree is hereby modified as follows: Nothing in the Consent Decree shall require the defendant City of Chicago to pay a final tort judgment under $1,000.00 in any particular order.

DATED: August 2, 1991

ENTER: /s/ JOHN F. GRADY
United States District Judge

[1]* IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chicago, Illinois — July 25, 1991 — 2:40 p.m.

SYLVIA EVANS, et al.,
Plaintiffs,
v. No. 77 C 4119
CITY OF CHICAGO, et al.,
Defendants.

BERTHA BALARK, et al.,
Plaintiffs,
v. No. 79 C 1939
CITY OF CHICAGO, et al.,
Defendants.

CURTIS COLLUM, et al.,
Plaintiffs,
v. No. 79 C 2493
CITY OF CHICAGO, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

APPEARANCES:

For the Plaintiffs:

MR. EDWARD T. STEIN
201 North Wells Street
Suite 1900
Chicago, Illinois 60606

MR. JOHN CASHION
33 North LaSalle Street
Suite 2500
Chicago, Illinois 60602

[2] For the Defendants:

CITY OF CHICAGO
180 North LaSalle Street
Room 704
Chicago, Illinois 60601, by
MR. BENNETT W. LASKO,
MS. RUTH MOSCOVITCH
Assistant Corporation Counsel

[3] (The following proceedings were had in open court:)

THE CLERK: 77 C 4119 and related cases, Evans v. Bilandic, for ruling.

THE COURT: Good afternoon, counsel.

MR. CASHION: Good afternoon.

MR. STEIN: Good afternoon, your Honor; Edward Stein for the Balark and Collum plaintiffs.

MR. CASHION: John Cashion for the Evans class plaintiffs.

MS. MOSCOVITCH: Ruth Moscovitch and Bennett Lasko on behalf of the City of Chicago.

THE COURT: Good afternoon.

If you will be seated, I will give you my ruling.

The motion currently before the Court is plaintiffs' motion to reconsider various orders I entered on October 31, 1990, which were docketed on November 2, 1990. The

plaintiffs' motion will be granted in part and denied in part.

I will begin my remarks by discussing the holding of the Court of Appeals in what we have come to call Evans I, 689 F.2d 1286 (1982). That decision of the Court of Appeals affirmed my holding that the practice of the City of Chicago of paying judgments less than $1,000 ahead of those that were in excess of $1,000 was a denial of equal protection of the law to those judgment creditors whose judgments exceeded $1,000.

I have reached certain other matters in my ruling prior [4] to the first appeal, but the Court of Appeals reversed those rulings and held that it had been premature for me to address the constitutionality of a certain statute of the State of Illinois upon which the City had not relied to justify its practices. More precisely, the Court of Appeals held that the plaintiffs lacked standing to challenge that statute on due process grounds.

The important thing for today's purposes is that the holding of Evans I was that it was a denial of equal protection for the City to pay judgments of less than $1,000 ahead of those which were in excess of that amount. Some seven years later in Evans II, 873 F.2d 1007 (1989), the Court of Appeals overruled this holding of Evans I.

Quoting from 1018 of Evans II, the Court concluded:

> "Our decision in Evans I was clearly erroneous in its conclusion that the City's practice of prioritizing tort judgments under $1,000 denied the plaintiffs the equal protection of the laws. To that extent, we overrule Evans I."

Now, between Evans I and Evans II, certain proceedings took place in this Court after the remand in Evans I. The case had been remanded for further proceedings, and we had a trial on damages. At the damages trial, the plaintiffs argued that not only the City's practice of prior-

itizing judgments less than [5] $1,000 was a violation of equal protection but that certain other practices of the City were also a violation of equal protection. Specifically, the plaintiffs argued, and I agreed with the plaintiffs, that the practice of paying non-tort judgments in a manner that was preferential, at least as far as time was concerned, to the payment of tort judgments was a violation of equal protection.

I also agreed with the plaintiffs that the chronic failure of the City to budget sufficient money for the payment of tort judgments within a reasonable period of time constituted a denial of equal protection since that failure resulted in tort judgments being treated differently than similarly situated judgments that were not based on torts or at least were not payable out of the tort judgment fund.

I then awarded damages to the plaintiffs based upon what I regarded as the law of the case concerning the prioritization of the $1,000-and-under judgments and these two additional theories concerning the denial of equal protection. All of my rulings were based on equal protection grounds. I discussed due process considerations at length but specifically refrained from basing my decision on due process grounds.

An appeal was taken from the damages judgment, and this resulted in Evans II. As I have indicated, Evans II overruled Evans I to the extent that Evans I had held that the prioritization of under-$1,000 judgments was a violation of [6] equal protection.

The Evans II Court went further, however, and also reversed my decision in the damages trial that failure to pay all judgment creditors, tort or not tort, in a single order violated equal protection. The Court at page 1018 stated in its conclusion:

> "We find that the City's failure to establish a single order of payment of all judgment creditors did not violate equal protection. Therefore, the decision of the District Court is reversed."

So there were two parts to the Evans II holding. First was an overruling of the equal protection holding of Evans I, and the second part of Evans II was a reversal of the new equal protection holdings I had made at the damages trial. The net result of Evans II was to eliminate any equal protection argument that the plaintiffs had in regard to the City's practices concerning the payment of judgments.

The conclusion that I have quoted at page 1018 of Evans II does not specifically reverse my finding that the chronic underbudgeting was a violation of equal protection. However, it seems to me that Evans II must be read as reversing that holding.

At page 1017 the Court stated:

> "Likewise, the District Court's holding that the equal protection clause demands that the City raise more tax [7] revenue to meet all obligations promptly is not warranted under the rational basis test."

And then further down on the page:

> "The City's alleged failure to raise adequate revenue to quickly meet all its tort judgment obligations does not violate equal protection."

So I read Evans II as holding that there is no equal protection ground upon which the City can be compelled to budget adequate amounts of money to pay tort judgments within any period of time the Court might hold is required.

The reason we are here this afternoon and have been wrestling with the continuing problems of this case for the last two years is that between Evans I and Evans II,

the parties negotiated a consent decree. The Court entered that consent decree on May 31, 1984, some two years prior to Evans II. After Evans II, the City filed a motion to vacate the consent decree. That motion was filed on November 28, 1989.

The motion at page 3 recites the grounds:

> "This request is based on two grounds under Rule 60(b)(5):
>
> a. The decree was based on a Court of Appeals decision which has since been reversed;
>
> b. It is no longer equitable that the judgment have prospective application."

At page 4 of the motion, the City stated:

[8] "At the time this Court entered the consent decree, the parties and the Court were under the belief that the duties created by the consent decree were constitutionally mandated as decided by the Court of Appeals in Evans I, which at that time was the law of this case."

The parties briefed the motion to vacate, and after considering the respective arguments, I entered one of the orders the plaintiffs have moved to reconsider; namely, the order of October 31, 1990, vacating the consent decree.

In opposing the motion to vacate, the plaintiffs had argued that Evans II had done nothing to affect their due process argument and that the consent decree should be regarded as based upon the due process arguments which had not been affected by Evans II.

At page 3 of my order granting the motion to vacate, I stated as follows:

> "While this may be true, it appears that the due process holding of Evans I has not survived Evans II. See Evans II at 1018, note 15, stating that because this Court did not base its decision in the damage trial on due process grounds and neither party

raised the question of due process in the Evans II appeal, 'the due process claim has not survived to this stage of the litigation.' "

[9] "Thus," I continue, "it appears that all legal underpinning for the consent decree has been eliminated by Evans II. We agree with defendant that this case falls squarely within the language of Rule 60(b)(5) in that the consent decree was based on a judgment, Evans I, that has now been overruled."

Further down on page 3, I concluded:

"There is no doubt in the Court's mind that the City would never have consented to the decree had it not felt constrained to do so by the decision of the Court of Appeals in Evans I."

These statements that I have just quoted from my order vacating the consent decree were based upon a misinterpretation of the facts of this case and a misapprehension as to the timing of certain critical events. I emphasized in my order vacating the consent decree that the Court of Appeals in Evans II had said that the due process issue had not survived in the case to the point of the decision in Evans II; namely, 1989. Evans II said nothing whatever about what the status of the due process claim was back in 1984 at the time the consent decree was negotiated and agreed to by the parties except to say in several places that the due process questions considered in Evans I were not before the Court in Evans II. Evans I had not decided the question of whether the City's customary delay in the payment of judgments was a violation of due process. That question was [10] explicitly left open by Evans I. It was not decided by Evans II as is made abundantly clear by Footnotes 8, 11, and 15 of Evans II.

In saying, as I unfortunately did in my order vacating the consent decree, that all legal underpinning for the con-

sent decree had been eliminated by Evans II, I was overlooking the fact that the language in Evans II about the elimination of the due process issue from the case was not addressed to the situation that existed at the time of the entry of the consent decree.

Looking at the consent decree itself, paragraph nine on page 7 reads as follows:

> "On January 28, 1981, the District Court entered partial summary judgment in favor of the plaintiffs, ruling that the alleged policies and practices of the defendants, as herein described, deprived plaintiffs of due process and equal protection of the law. *Evans v. City of Chicago, supra.*
>
> That order was affirmed on appeal as to the equal protection claim, *Evans v. City of Chicago,* 689 F.2d 1286 (7th Circuit 1982). The claim regarding the deprivation of due process of law was remanded to the District Court for further proceedings."

So here we have the parties themselves describing the situation that existed at the time of the consent decree:

[11] "The claim regarding the deprivation of due process of law was remanded to the District Court for further proceedings."

I turn now to the specific language of Rule 60 upon which the City relies. Rule 60(b) states that, "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons." And reason number five, as applies to this case, or at least is involved in the arguments of the parties in this case, is "a prior judgment upon which it;" namely, the judgment, "is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

There are two parts to 60(b)(5), one, the vacation of the prior judgment and, two, the existence of circumstances under which it is no longer equitable that the judgment have prospective application. I will deal with each of those in turn.

Is the consent decree based on a judgment which has been reversed or otherwise vacated? The answer is yes, in part. The equal protection holding of Evans I was the law of the case as of the entry of the consent decree and, I think, clearly entered into those considerations which resulted in the consent decree. The consent decree itself refers to Evans I and refers to the specific holding of Evans I; namely, that the [12] preferential payment of judgments under $1,000 was a denial of equal protection. Nothing else in the consent decree is based upon a judgment that has been reversed or otherwise vacated or overruled.

Evans II did reverse my findings that paying different kinds of judgments out of chronological order and chronic failure to budget sufficient money constituted denials of equal protection. However, those equal protection holdings did not occur until long after the entry of the consent decree and, as far as I can recall, had never been argued to the Court or considered by the Court up to the time of the entry of the consent decree. There is nothing in the consent decree that reaches out for support to my later holdings that these additional practices of the City constituted denials of equal protection.

Evans II does not hold that those practices; namely, of not paying judgments in chronological order and failing to budget adequately, do not constitute denials of due process. Not a word in Evans II so holds. That is a question that was settled by the parties in the consent decree. The due process questions left open by Evans I and remanded by Evans I for consideration by this Court

were resolved by the parties in the consent decree, and the consent decree so states.

Paragraph nine says that issue was remanded for further proceedings, and paragraph one of part three of the [13] consent decree at page 8 says that the parties are settling all matters left open with the exception of the claims for damages and attorney's fees.

The City argues that Evans II can be read as rejecting the rational basis test that would be the underpinning of a due process claim just as much as it rejected that same test or, rather, found that the City's practices did not violate that test under the equal protection claim. It is true that in my decision in the damages trial, I observed that the rational basis test appeared to be relevant to both an equal protection and a due process analysis. And it may be that in light of Evans II the Seventh Circuit, if confronted with the due process questions today, would say that no violation of due process is involved because there is a rational basis for the City's practices of paying, for instance, contract judgments ahead of tort judgments, or personnel judgments ahead of judgments payable out of the tort judgment fund, and a rational basis for the failure to budget enough money to pay tort judgments within a reasonable time.

The point is, I believe, that that holding has not yet been made. Rule 60(b) talks about a judgment that has been reversed or otherwise vacated. There is nothing in Evans II that reverses, vacates, or overrules any due process holding of any kind. So it seems to me clear that the City does not qualify for relief under the first portion of the Rule 60(b)(5). [14] Nothing upon which the consent decree is based has been overruled with the exception of the equal protection holding of Evans I.

During the time that the Court has had the plaintiffs' motion for reconsideration under advisement, we have con-

ducted hearings on the question of what motivated the City to enter into the consent decree. The Court has heard testimony of present and former City employees and testimony about what was in the minds of the Mayor and his aide, who are now deceased. At the most recent argument on the motion to reconsider, counsel for the City asserted that all of this evidence is irrelevant and that the Court should be guided exclusively by the decisions in Evans I, Evans II, and the language of the consent decree itself.

After considerable reflection, I have come to agree with that point of view. The effort to reconstruct what was in the minds of people back in 1984, seven years ago, some of whom are now deceased, is a difficult project at best. I think the Court can find its most reliable guideposts in this case by looking at the documents the City urges me to consider exclusively. There is a decision of the United States Supreme Court which, I think, contains some wisdom which is helpful to us in the present circumstances. The case is United States v. Armour & Company, 402 US 673, decided in 1971. The case involved the interpretation of a consent decree that had been [15] entered in 1920 in which Armour & Company had bound itself to refrain from various practices which the government had alleged would constitute violations of the antitrust laws.

The issue before the Court in 1971, 51 years later, was whether a certain relationship that Armour had entered into with Greyhound Corporation constituted a violation of that consent decree. The government contended that the Armour/Greyhound relationship did violate the consent decree, and Armour contended that it did not.

The Supreme Court concluded that while it is understandable that the government would want the language of the consent decree to apply to the practice under scrutiny,

or the relationship under scrutiny, and, had it thought of the particular circumstance, may well have insisted that the consent decree cover such a relationship, the fact was that the language of the consent decree simply did not fit the relationship that Armour had with Greyhound, and, therefore, the Court held that there was no violation of the consent decree. That is by way of general background.

The language of the Court that I find helpful is the following at pages 681 to 682. The government was arguing that what Armour was doing with Greyhound was frustrating the purpose of the consent decree, and the Court said the following:

"This argument would have great force if addressed to a Court that had the responsibility for formulating
[16] original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place. Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree em-

> bodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.
>
> For these reasons, the scope of a consent decree must [17] be discerned within its four corners and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the condition upon which he has given that waiver must be respected, and the instrument must be construed as it is written and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

I find that language instructive in two respects. First, it admonishes us to construe the decree within its four corners and not attempt to discern the probably opposing purposes of the parties when they entered into it. The second lesson we learn from the Armour case is that a party who has entered into a consent decree should be held to its bargain and should not be permitted to vary the consent decree or escape from its obligations by using some theory it chose not to litigate and chose, rather, to compromise.

In that latter connection, it is significant that the Court put emphasis upon what Armour, in this case I think the plaintiffs, had given up by the consent decree; namely, its right to litigate the issue of whether the kind of relationship it had with Greyhound would be a violation of the antitrust laws. In the instant case, the plaintiffs gave up their right [18] to litigate the very issue that had been remanded by the Court of Appeals in Evans I; namely, whether the practices of the City in regard to the payment of judgments violated the due process clause. It would be inequitable for this Court to say to the plain-

tiffs that having given up their right to litigate the due process issue and having had that surrender confirmed by the express holding to that effect in Evans II, that they now must forfeit the benefit of that bargain. That would be inequitable, and that is why the second part of Rule 60(b)(5) provides no comfort whatever for the City. There is no basis upon which this Court could hold that it is no longer equitable that the judgment should have prospective application.

Even on the matter resolved against plaintiffs by Evans II, the equal protection argument on the under-$1,000 judgments, the language of Evans II provides no reason for this Court to hold that continued enforcement of the consent decree would be inequitable. At page 1015 of Evans II, the Court of Appeals, referring to the $1,000 question, stated:

> "The reasons presented by the City for the practice are by no means compelling," and on the same page stated that the City's practice, "may not be a civics textbook example of good government."

That does not sound to me like the description of a position which cries out for equitable intervention.

Nonetheless, equity or not, the City does qualify for [19] relief under the first portion of Rule 60(b)(5), because there is no question that the $1,000 holding of Evans I has been overruled.

The City also refers the Court to Rule 60(b)(6), which provides that the Court may relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment." That is a pretty broad commission, but there is nothing in the case which seems to me to qualify as such another reason. The City argues that the consent decree embodies obligations which could not have been imposed upon the City under current law; namely, under Evans II, and that it is, therefore, inequitable

or somehow unjust to continue the consent decree in effect. This argument can only apply to the $1,000 judgment holding of Evans I, which the Court concedes is no longer the law, has been expressly overruled by Evans II, and will be modified, but this argument of the City does not apply to anything other than the $1,000 holding of Evans I. The due process claims that were resolved in the consent decree have not been declared not to be the law.

I conclude that with the exception of the $1,000 judgment aspect of the consent decree, there is no basis on which the Court should grant relief to the City under either Rule 60(b)(5) or Rule 60(b)(6).

I come now to the ordering portion of this decision. By the way, I will prepare a short written order incorporating [20] these rulings. Plaintiffs' motion to reconsider the order of October 31, 1990, vacating the consent decree is allowed in part and denied in part. The decree will be modified to eliminate any requirement that there be no distinction on the timing of payment of judgments under and over $1,000. In all other respects, the order of October 31, 1990, is vacated, and the consent decree is reinstated.

The consent decree will have to be modified so as to take into account the specific holding of Evans II. Since the language of the consent decree is the language of the parties, I am inclined to allow them, at least in the first instance, to formulate the appropriate language to effectuate the necessary modification of the decree. This will, of course, be without prejudice to the City's position that the entire decree should be vacated.

In the event the parties are unwilling or unable to reach agreement as to the appropriate language of modification, the Court will enter its own modifying order. If I were to do it this afternoon, I would say something short and

simple, such as nothing in the consent decree shall require the defendant to pay judgments under $1,000 and judgments over $1,000 in any particular order. Now, the reason I do not do that this afternoon is that I do not want to get into a situation where a change in one section of the decree could have unanticipated complications for some other section of the decree, and that is [21] why I would ask counsel to study the matter carefully and come up with a suggestion that the Court can adopt.

The second order that I will enter today is that I will vacate the order denying plaintiffs attorney's fees. I am not going to rule at this time on plaintiffs' motion for attorney's fees. That will be a major litigation all by itself. I know that today's order will be appealed, and I have no idea whatever as to what the result on appeal might be. It is only after I know whether or not plaintiffs have prevailed in this case and, if so, to what extent, that I can fix a fee pursuant to the statute. I have not previously ruled on a petition for fees for that reason, and I am no more inclined now to undertake that possibly unnecessary work than I have been before. I realize, of course, that plaintiffs' attorneys would like to be paid, but I will simply point out that any order of payment that I did enter would be stayed pending appeal anyway. So there is no prospect of immediate payment here, in any event.

Now, the third thing I am going to do today is to deny the defendants' motion for return of the $60,000 interim fee payment made to Edward Stein. That matter, too, will be held in abeyance, if you will, until final resolution of the questions we have been addressing today. It may well be that ultimately that relief will be something the City would be entitled to, but it would be premature to address that now.

Finally, I deny plaintiffs' motion to reconsider the [22] order of October 31, 1990, denying their motion for a rul-

ing on the constitutionality of Illinois Revised Statutes, Chapter 85, Section 909-104(a).

Now, what I would like to do is to set a date for you to come in here with the results of your effort to formulate appropriate language of modification, and I would like to do that within the next couple of weeks. Is there any problem in that regard?

MR. CASHION: No.

MS. MOSCOVITCH: I was scheduled to be out of town—it is not clear that I will be, but I was scheduled to be out of town until August 19th. So if we could do it in that week, there would be no danger that I would not be able to be present. I know that is a little bit later than your Honor would like.

THE COURT: That is all right.

MS. MOSCOVITCH: The other possibility—

THE COURT: It is just that I want to get this done while it is fresh in everybody's mind.

MS. MOSCOVITCH: Well, we could come in next week, also.

THE COURT: Next week would be my preference. Let's get it done next week. How about—let's see. This is Thursday.

MS. MOSCOVITCH: If you could give us until Thursday or Friday, that would give us an opportunity to have people in the [23] comptroller's office think this through.

THE COURT: Well, how about Friday, August 2, at 10:00 o'clock? Is that okay?

MS. MOSCOVITCH: Yes.

MR. STEIN: Yes.

THE COURT: All right. Now, is there anything I have not addressed today that I should have addressed?

MR. CASHION: Could I just ask you on one procedural point?

THE COURT: Yes.

MR. CASHION: If we can agree on that language, can we just send you the agreed order and then we don't have to show up on August 2nd?

THE COURT: Sure. Yes, that would be fine.

I might say, too, that I don't think you have got any kind of a final order here until that modifying order is entered. So nobody gets prejudiced on an appeal situation.

Now, I am going to enter some of these orders right away, but you have got 30 days to appeal. So I don't think there is any problem anyway.

MR. STEIN: Your Honor, there is one—maybe not a problem but just a tricky point. The local rules of the District Court require attorney's fees petitions to be filed within 90 days after an order where, let's say, they prevailed. And I understand that you don't want to rule—you don't want [24] us to file petitions and you don't want to rule on attorney's fees until, say, the Seventh Circuit has an opportunity or the parties agree to something. But I don't want to be prejudiced as the plaintiff.

THE COURT: How about if I put in the order that I am going to enter—

MR. STEIN: And continue.

THE COURT: —that the local rule requiring submission of attorney's fees petitions within 90 days shall be waived? Does the City have any objection to that?

MS. MOSCOVITCH: No.

Let me make sure I am clear. Are you talking about a fee for—a petition for fees for all of these proceedings?

MR. STEIN: Well, yes, our petition for fees with respect to—up to and including the damage trial therein. The petition for fees that I am talking about are these petitions now. Now, I could do that. I could prepare the petition and the time sheets if the Court wants and then just not rule on it until later. Therefore, this—

THE COURT: Did you ever go back and revise—

MR. STEIN: Yes.

THE COURT: --your original ones in light of Evans II?

MR. STEIN: I absolutely did, and I sorted it out the way the Court wanted it sorted out.

THE COURT: Find, good.

[25] Well, then what they are talking about, Ms. Moscovitch, is the fees associated with this motion to vacate the consent decree and these other matters.

MS. MOSCOVITCH: I have no problem. If you feel that you can waive it, I have no problem with doing it that way, or if they want to put it on file and we will just agree that it is on file, whatever is easiest for them.

MR. STEIN: I could just file a motion for fees without the time sheets, which would save me some time.

THE COURT: Well, except probably the rule—I have not looked at the rule in a long time. It must provide for the filing of more than that, doesn't it?

MR. STEIN: I don't remember.

THE COURT: I don't know what it says.

MR. CASHION: I would suggest that we just not go into the fee thing at all and concentrate on getting the current things out of the way.

THE COURT: Oh, I understand, but Mr. Stein wants to make sure that there is no waiver of fees by failing to comply with the local rule. I think the local rule is something I can suspend for any good reason, and certainly there is a good reason here.

MR. STEIN: I think in a footnote to your order reversing the question of fees that Rule 45, local Rule 45, shall not apply.

[26] THE COURT: This is local Rule 45?

MR. STEIN: I am 99 percent sure it is.

THE COURT: I will find out what it is. Okay, anything else?

MR. STEIN: Thank you very much, your Honor.
THE COURT: Thank you.
MS. MOSCOVITCH: Thank you very much.
MR. CASHION: Thank you.

(Which were all the proceedings had in the above entitled cause on the day and date aforesaid.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-3006 and 87-3085

SYLVIA EVANS, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants.

BERTHA BALARK, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants.

CURTIS COLLUM, *et al.*,

Plaintiffs-Appellees,
Cross-Appellants,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 77 C 4419, 79 C 1939, and 79 C 2493—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 8, 1988—DECIDED APRIL 27, 1989

Before BAUER, *Chief Judge*, and WOOD, JR. and RIPPLE, *Circuit Judges.**

WOOD, JR., *Circuit Judge*. This is a consolidated class action suit that has been in the courts for nearly a decade. The three plaintiff classes sued the City of Chicago under 42 U.S.C. § 1983 claiming that the City's delay in paying tort judgment claimants violated their civil rights. This court originally dealt with this case over six years ago. *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982) ("*Evans I*"). There we affirmed the district court's finding that Chicago's practice was unconstitutional. The case was remanded to the district court to sort out the question of damages due to the parties. In district court, plaintiffs advanced another equal protection claim in addition to the claim originally passed on by this court. The district court found for the plaintiffs on both equal protection allegations and awarded damages. The City has appealed, asking us not only to review the district court's findings but to also re-examine our own decision in *Evans I*.

I. FACTUAL BACKGROUND

Millions of dollars in court judgments are entered against the City of Chicago ("the City") each year. The City's practice of delaying payment of some judgments is under attack by three different plaintiff classes.

A. The Plaintiff Classes

Plaintiff Sylvia Evans settled her lawsuit against the City for the wrongful death of Andrew Evans and a judgment of $67,000 was entered against the City on January 30, 1976. After entry of her judgment, Evans learned that the City had a policy of promptly paying (within thirty

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* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of overruling *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982). Circuit Rule 40(f).

days) tort judgments under $1,000 while it delayed paying any tort judgments over $1,000 for a substantial time period. When Evans learned that the City would delay the payment of her judgment, she filed an action against the City under 42 U.S.C. § 1983 claiming that her civil rights had been violated by the delay. The action was certified as a class action under Fed. R. Civ. P. 23(b)(3). The *Evans* class includes tort judgment creditors holding judgments larger than $1,000 against the City whose judgment payments are more than one year overdue.[1]

Plaintiff Bertha Balark brought a civil rights action under 42 U.S.C. § 1983 against six Chicago police officers in 1977. The case was settled by the parties and a judgment was entered by the United States District Court. The judgment was to be paid by the City.[2] Upon learning that the City would delay paying her judgment, Balark brought a separate class action under 42 U.S.C. § 1983. The *Balark* class was certified and includes tort judgment creditors holding judgments larger than $1,000 against the City whose judgment payments are less than one year

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[1] The *Evans* class was defined as:

> [a]ll persons in whose favor a final tort judgment in excess of $1,000 against the City of Chicago has been or will have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill. Rev. Stat. ch. 85, § 9-104(a) or (b) to commence timely payment of installments on the judgment pursuant to Ill. Rev. Stat. ch. 85, § 9-104(b) no later than the end of the first fiscal year following the entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago. *Evans I*, 689 F.2d at 1290-91 n.6.

[2] Ill. Rev. Stat. ch. 85, § 9-102.

overdue.[3] The *Evans* and *Balark* actions were consolidated on January 28, 1981.[4]

Plaintiff Curtis Collum entered into a settlement with the City and four police officers who allegedly beat him. Collum claims that at the time his judgment was entered, it was the practice and custom of the City to delay payment of judgments from two to four years. As a result of these delays, a market developed for the sale of judgments against the City. Unwilling to wait to collect his judgment from the City, Collum sold his judgment at a discount. Collum filed this class action suit in 1979 under

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[3] The class was certified and defined as:

> [a]ll persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year following the year in which the judgment was obtained. *Evans I*, 689 F.2d at 1291 n.7.

[4] During the time these federal lawsuits were proceeding, similar actions had been filed in Illinois state court. In *Nebel v. City of Chicago*, 53 Ill. App. 3d 890, 369 N.E.2d 74 (1977), the City's practice of delaying payment of tort judgments was challenged. The parties settled the case in 1980, with the City agreeing to provide $9 million in each of the 1980, 1981, and 1982 annual budgets to pay tort judgment creditors. The City also agreed to appropriate adequate funds in the future to pay all tort judgments and attorneys' fees. This settlement was vacated and remanded by the Illinois Appellate Court. *Waters v. City of Chicago*, 95 Ill. App. 3d 919, 420 N.E.2d 599 (1981). The appellate court found that the settlement's provisions concerning trustee and attorneys' fees did not provide notice to the holders of judgments less than $1,000. *Id.* at 925, 420 N.E.2d at 604. The settlement was later revised by the trial court, but it was again vacated by the appellate court, *Waters v. City of Chicago*, 111 Ill. App. 3d 51, 443 N.E.2d 759 (1982), which was still troubled by the manner of awarding attorneys' fees. An issue of abstention was raised in the *Evans I* trial, but this court held that it was inappropriate for the federal court to abstain in this situation. *Evans v. City of Chicago*, 689 F.2d 1286, 1294-96 (7th Cir. 1982).

42 U.S.C. § 1983 alleging that the delay violated equal protection and due process. While the *Evans* and *Balark* classes are made up of creditors who waited for the City to pay their judgments, the *Collum* class is made up of plaintiffs who assigned their judgments at a discount. The class was certified under Fed. R. Civ. P. 23(b)(3). The *Collum* class includes tort judgment creditors holding judgments larger than $1,000 against the City who assigned their judgments at a discount knowing the City would delay payment.[5] Plaintiffs in the *Evans* and *Balark* classes are original judgment holders while the *Collum* plaintiffs are assignors, since they assigned their judgments at a discount. Eighty percent of judgment holders with judgments over $1,000 sold their judgments. Purchasers bought judgments at a discount and the amount of the discount reflect a prediction of the delay in payment. All three classes were consolidated at trial and on appeal.[6]

B. The City's Practice

Under the budgetary scheme adopted by the City, judgments levied against the City are paid out of different city funds depending on the origin of the claim. At trial, the City maintained that all tort and nontort judgments arising from certain special enterprise activities ("enterprise judgments") are paid from revenues generated by the enterprises themselves. Such enterprises include the Water Fund, the Sewer Fund, O'Hare Airport, Midway

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[5] The *Collum* class was defined as:

> [a]ll persons in whose favor a final tort judgment or settlement in excess of $1,000.00 against the City of Chicago has been entered and who, commencing with fiscal year 1974 assigned their tort judgments, at a discount, prior to full or partial payment, in reliance upon defendant's policy and practice of delaying payments of judgments. *Evans v. City of Chicago*, 522 F. Supp. 789, 807-08 (N.D. Ill. 1980).

[6] The *Collum* class was not a party to the appeal in *Evans I*.

Airport, and the Chicago Skyway. These enterprises are meant to be self-sustaining with user fees generating revenue and are separated for accounting purposes from the City's general revenue funds. Judgments arising from relationships undertaken by the City ("contract judgments") are paid from departmental funds. When a city department enters a contract, the department's budget is encumbered for the maximum amount that could be due under the contract. If a judgment is levied against the City for breach of that contract, the judgment is paid out of the encumbrance already on the books. The departmental appropriations that pay such contract judgments are financed by general municipal taxes appropriated to the City's general corporate fund. Judgments arising out of employment-related litigation are usually payable from the personnel budgets of the affected departments.

All remaining judgments against the City ("tort judgments") are paid from the City's Tort Judgment Fund, also known as the "395 Fund." Revenue for the 395 Fund is raised through a separate property tax levy. This fund is not part of the City's general corporate fund.

Between 1972 and 1983, the period we are most concerned with, the City normally paid enterprise judgments and contract judgments within thirty to one hundred-fifty days of presentment. However, this was not the case for judgments paid out of the 395 Fund. The 395 Fund was annually underfunded, resulting in the City's inability to pay off all tort judgments in a timely fashion. Tort judgments of $1,000 or less were given priority and paid off within approximately thirty days of presentment. Judgments over $1,000 were paid off in the order they were entered, but at a much delayed rate. The average delay in payment of tort judgments over $1,000 ranged from fifteen months to four years after the entry of final judgment. Payment of some judgments apparently was delayed as long as nine years. The City pays interest at the statutory 6% rate at the time it pays the judgment.

Ill. Rev. Stat. ch. 110, § 2-1303.[7] The delay in paying tort judgments stemmed from the City's practice of levying a special property tax each year to pay judgments at an amount that was far less than needed to pay the annual tally of judgments. The City refused to apply any other revenue to the payment of tort judgments.

C. *Evans I*

Plaintiffs individually and collectively launched a number of attacks on the City's system of paying tort judgments. In the first trial, the City's distinction between judgment creditors above or below $1,000 was alleged to be a violation of the equal protection clause of the fourteenth amendment. Plaintiffs also alleged that the practice of delaying

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[7] Although the parties did not raise the issue, we have some concerns about the City's handling of tort judgments entered by a federal district court. The City's policy of paying the 6% interest rate mandated by Illinois law is correct for all judgments entered prior to October 1, 1982. On that date, 28 U.S.C. § 1961 was amended. The old language establishing interest on judgments entered in a federal court at the rate set by state law was replaced by language providing that judgment debtors pay interest at the "coupon issue yield equivalent" of U.S. Treasury bills. 28 U.S.C. § 1961(a). This new rate of interest does not apply to judgments entered before the effective date of the statute. *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir.) (amended section 1961 does not apply to judgments entered before October 1, 1982), *cert. denied*, 469 U.S. 918 (1984). *See Litton Systems v. AT&T*, 746 F.2d 168, 175 (2d Cir.) (new rate not retroactive and it does not apply to cases pending at that date on direct review), *cert. denied*, 464 U.S. 1073 (1984); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983).

On judgments entered in federal district court after October 1, 1982, the City must pay the interest rate prescribed by 28 U.S.C. § 1961(a) and provide all relief ordered by the court. It is unclear from the record whether the City has followed this rule. The correct rate of interest is an essential part of the relief granted by a district court. When a judgment is entered by a federal district court, the City must pay the proper amount of interest, regardless of the limit set by state statute. *See Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053-54 (7th Cir. 1988).

payment of judgments for up to four years deprived them of due process.[8]

The district court, having certified the plaintiff classes, consolidated the *Evans* and *Balark* cases. On plaintiff's motion for partial summary judgment and immediate payment, the district court ordered the City to pay immediately all judgments held by *Evans* class members plus costs and interest, enjoined the City's practice of paying judgments of $1,000 or less before earlier-entered, larger judgments, and declared the practice unconstitutional. The court also declared that Ill. Rev. Stat. ch. 24, § 8-1-16 was

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[8] Plaintiffs also challenged the constitutionality of Ill. Rev. Stat. ch. 85, § 9-104, which states:

> (a) If a local public entity does not pay a tort judgment or settlement during the fiscal year in which it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing fiscal year.
>
> (b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment.

Ill. Rev. Stat. ch. 85, § 9-104, *amended by* P.A. 84-1431, Art. 1, § 2, 1986.

The district court did not hold § 9-104(a) facially unconstitutional and the *Evans I* court therefore did not rule on that issue. *Evans I*, 689 F.2d at 1291-92. The district court did find § 9-104(b) unconstitutional and set forth the minimum procedures it found necessary to guarantee due process. This court in *Evans I* vacated that portion of the decision, finding that the district court improperly reached the issue. *Evans I*, 689 F.2d at 1299. The constitutionality of § 9-104 is not at issue on this appeal. This court will follow the lead of the *Evans I* court and refrain from expressing any opinion on the constitutionality of the statute.

unconstitutional, to the extent that it authorized the practice.[9] The district court found that the City's policy violated equal protection and deprived the plaintiffs of property without due process.[10]

On appeal, this court affirmed the district court's finding that the City's practice of paying judgments out of order was unconstitutional. The court in *Evans I*, applying the rational basis test articulated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), found that the practice was a violation of equal protection.[11] The hold-

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[9] This statute allowed the City to levy a limited judgment tax in addition to the maximum amounts authorized for all other taxes and it exempted judgments of $1,000 or less from the requirement that judgments be paid in the order in which they were obtained. *Evans I*, 689 F.2d at 1299 n.16. On appeal, the *Evans I* court found that although the City's practice did not originate with Ill. Rev. Stat. ch 24, § 8-1-16, it was still unconstitutional insofar as it incorporated the practice. *Evans I*, 689 F.2d at 1300.

[10] The district court also declared the judgment final and appealable under Fed. R. Civ. P. 54(b) and reserved the issue of attorneys' fees. *Evans I*, 689 F.2d at 1291.

[11] The *Evans I* court also discussed whether the City's practice deprived the plaintiffs of property without due process. *Evans I*, 689 F.2d at 1296-99. The court concluded that Illinois law created a right to prompt payment of a judgment in some circumstances. The *Evans I* court found that:

> [u]nder Illinois law, if the City has not invoked § 9-104(b) before the end of the fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law.

Evans I, 689 F.2d at 1297.

Delaying payment after that time constituted a deprivation of property for purposes of the fourteenth amendment. *Id.*

The importance of this due process finding is unclear. While the *Evans I* court found a deprivation, *see also Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 132 (5th Cir. 1986) (distinguishing *Evans I* since Illinois law creates specific property right);

(Footnote continued on following page)

ing in *Evans I* applied only to the issue of paying tort judgments assessed to the 395 Fund out of order. The district court's decision was affirmed[12] and the case was sent back to iron out the question of damages and other issues.

D. The Consent Decree

After this case was remanded to the district court, the City negotiated a consent decree with the *Evans* and *Balark* plaintiffs. The consent decree, entered on May 31, 1984, governs the payment of tort judgments that remained unpaid as of December 31, 1983 and the payment of future judgments beginning in 1984. The decree was designed to bring payment of judgments up to a current basis by the end of 1985. The decree required that the City appropriate sufficient funds annually to satisfy the City's anticipated tort liabilities. The decree also required the City to pay its judgments in the order in which they are entered. The decree expressly left open all claims to damages; by its terms it could not be used as evidence in the trial. No judgments entered after December 31, 1984 were at issue in the *Evans II* trial.

E. *Evans II*

This case returned to the district court in 1987, ostensibly for computation of damages. However, the plaintiffs

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[11] *continued*

Argento v. Village of Melrose Park, 838 F.2d 1483, 1491 (7th Cir. 1988) (*Evans I* stands for proposition that Chicago's practice was "deprivation of property without due process of law"), the focus of *Evans I* and all subsequent litigation has been the alleged equal protection violations. The *Evans II* district court found no due process violations and the due process issue was not argued by the parties on this appeal.

[12] The *Evans I* court vacated the section of the district court's opinion that found Ill. Rev. Stat. ch. 85, § 9-104(b) unconstitutional. *Evans I*, 689 F.2d at 1300.

were not content with the liability established by this court in *Evans I* and presented a new theory of liability to the district court. The plaintiffs noted that enterprise and contract judgments were paid in order while tort judgments were delayed. Plaintiffs now argued that delaying the payment of tort judgments out of the 395 Fund while promptly paying nontort judgments with other funds violated equal protection.

The district court agreed and found that this system constituted a separate equal protection violation. The district court held that the City violated equal protection by not paying all judgments in order, regardless of the source of funding or the amount of the judgment. The court found that the holders of tort judgments for amounts greater than $1,000 were denied equal protection because they suffered greater delays in the payment of their judgments than did judgment creditors who held enterprise judgments, contract judgments, judgments payable from department personnel budgets, or judgment creditors who held tort judgments of less than $1,000 and received priority payment from the 395 Fund. The City's chronic underbudgeting of the 395 Fund was in itself an equal protection violation and the district court stated that the City must raise taxes to pay off judgment creditors. The district court could find no rational basis for paying judgments out of separate funds or for underfunding the 395 Fund. The district court dealt with whether paying tort judgments under $1,000 before judgments over $1,000 violated equal protection by stating that this court's holding in *Evans I* was the law of the case.

The district court created a complicated system for computing damages resulting from the equal protection violations. *Evans* and *Balark* plaintiffs would receive interest on their judgments at a rate greater than the statutory post-judgment rate of 6%. The interest would be computed beginning on the sixty-first day after entry of the judgment through the date the judgment was actually paid. The interest rate is to be calculated pursuant to a for-

mula stipulated by the parties that will yield a rate of interest equal to "the difference between the statutory rate of interest and the money that plaintiffs could have earned with the funds had they had them when they should have had them." *Collum* plaintiffs were divided into two groups based upon the length of the City's delay in paying tort judgments at the time a given judgment was sold at a discount. *Collum* plaintiffs who sold their judgments during a time when the City was delaying payment by a year or more were awarded damages equal to the amount of their discount, prorated over the period beginning sixty-one days after the entry of judgment through the date of payment to the assignee, plus interest at the stipulated rate. *Collum* plaintiffs who assigned their judgments at a time when the City was delaying payments by less than a year were awarded damages on the same basis as the *Evans* and *Balark* plaintiffs.

Final judgment was entered on November 23, 1987 and the City filed a timely notice of appeal. The City asks this court to re-examine its decision in *Evans I* and argues that this case falls within a recognized exception to the law of the case doctrine. The City also asks us to reverse the *Evans II* district court's new findings on equal protection. The *Collum* plaintiffs also filed a cross appeal, claiming that the district court incorrectly calculated the damages due their class members.

II. DISCUSSION

This case presents us with the unfortunate and difficult task of re-examining an earlier decision of this court. We must first examine the law of the case doctrine and determine its applicability to the present situation. This court's decision in *Evans I* must be analyzed to determine how that opinion should affect this appeal. This court must also review the district court findings of additional equal protection violations.

A. The Law of the Case

The first issue is what effect we should give to this court's decision in *Evans I*. While that prior appeal did not dispose of all the issues presented on this appeal, the *Evans I* court did hold that the City's practice of delaying payment of tort judgments over $1,000 violated equal protection. This court has long held that "matters decided on appeal become the law of the case to be followed in all subsequent proceedings in the trial court and, on second appeal, in the appellate court, unless there is plain error of law in the original decision." *Kaku Nagano v. Brownell*, 212 F.2d 262, 263 (7th Cir. 1954). The law of the case doctrine "is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Barrett v. Baylor*, 457 F.2d 119, 123 (7th Cir. 1972) (citing *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950)).

It is important to note that the law of the case doctrine does not limit this court's power to reconsider earlier rulings in a case. The doctrine

> is a self-imposed prudential limitation rather than a recognition of a limitation of the courts' power. 1B Moore's Federal Practice ¶ 0.404[10] at 573 (2d ed. 1980). It is not, therefore, an immutable rule, but rather a way to foreclose continued appeals for reconsideration of prior rulings of law. In this respect, the law of the case doctrine must be distinguished from *res judicata*: '[O]ne directs discretion; the other supersedes it and compels judgment.'

Gertz v. Welch, 680 F.2d 527, 532 (7th Cir. 1982), (quoting *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922)), *cert. denied*, 459 U.S. 1226 (1983).

This court has, on a limited number of occasions in subsequent appeals, reconsidered a previous decision in the same case and concluded that the former ruling was clearly erroneous. *See, e.g. Devines v. Maier*, 728 F.2d 876,

880 (7th Cir.) (intervening Supreme Court decision led to reversal of earlier decision), *cert. denied*, 469 U.S. 836 (1984); *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980) (earlier pronouncement on jurisdiction was in error), *cert. denied*, 451 U.S. 976 (1981); *United States v. Habig*, 474 F.2d 57 (7th Cir.) (earlier decision was erroneous), *cert. denied*, 411 U.S. 972 (1973). Such a reconsideration should be avoided unless "one of three 'exceptional circumstances' exists: the evidence in a subsequent trial was substantially different; controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous, and would work a substantial injustice." *Barrington Press, Inc. v. Morey*, 816 F.2d 341, 342-43 n.2 (7th Cir. 1987) (quoting *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir. 1985)), *cert. denied*, 474 U.S. 902 (1987). *See also Devines*, 728 F.2d at 880. Applying these guidelines to this case, we note that there was indeed some new evidence at the second trial explaining why the City chose to prioritize judgments under $1,000. The record at the first trial was sparse on the subject of the City's reasoning for its practice. Plaintiffs chose to reopen the merits of this case in the second trial to establish a separate equal protection violation. This allowed the City to bring in more evidence explaining its conduct. While this new evidence alone may not compel reconsideration of our prior adjudication, this court is left with substantial doubt as to the correctness of that decision. By going beyond the remand for computation of damages and reopening and extending the equal protection analysis to a related situation, the underlying equal protection analysis was again exposed for reconsideration and review. "The law of the case does not demand obsequiousness right or wrong." *Champaign-Urbana News, Inc. v. J.L. Cummins*, 632 F.2d 680, 683 (7th Cir. 1980). We will therefore reconsider our prior determination in this matter to determine whether it may have been wrongly decided.

B. *Evans I* Equal Protection Analysis

The City's actions are being challenged under 42 U.S.C. § 1983[13] and its alleged equal protection violations fall into two categories. In the *Evans II* trial, the district court found that the City was obligated by the equal protection clause to establish a single order of payment for all judgments of any kind entered against the City. In addition, the City was obligated to raise sufficient revenues through taxation to allow it to pay all tort judgments from the 395 Fund as promptly as it paid other judgments. This holding by the district court is distinct from the prior decision made by this court in *Evans I*. There, we held that the City's practice of paying off all tort judgments under $1,000 within thirty days while delaying payment of judgments over $1,000 violated equal protection. *Evans I*, 689 F.2d at 1300. It is this *Evans I* holding that we must now review to determine whether it was clearly erroneous and should be reversed.

The equal protection clause "commands that states treat similarly situated people in a similar manner." *Faheem-El v. Klincar*, 841 F.2d 712, 727 (7th Cir. 1988) (en banc). *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). The first question presented is what standard of review this court should use in examining the validity of the City's practice. *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987). The court initially must determine whether the practice infringes on a fundamental right or discriminates on the basis of a suspect classification. *Faheem-El*, 841 F.2d at 727. Here, the classification made by the City is between holders of judgments larger than $1,000 and holders of judgments smaller than $1,000. This categorization does not implicate any fundamental right and it is not a suspect classification. When no suspect class or fundamental right

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[13] A city can be held liable under 42 U.S.C. § 1983 for unconstitutionally implementing a policy or custom. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

is involved, the court must apply a very deferential rational basis test. Under this test, "legislation is presumed to be valid, and will be sustained as long as the classification drawn by the statute is rationally related to a legitimate state interest." *Griffin*, 822 F.2d at 674. *See also City of Cleburne*, 473 U.S. at 440; *Vaden v. Village of Maywood*, 809 F.2d 361, 365 (7th Cir.), *cert. denied*, ____ U.S. ____, 96 L.Ed. 2d 381, 107 S. Ct. 2489 (1987).

The court in *Evans I* applied the rational basis test and concluded that the City's practice was not rationally related to a legitimate state purpose. In *Evans I*, the City argued that its practice "related rationally to the City's attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large amount of nuisance litigation." *Evans I*, 689 F.2d at 1299. The *Evans I* court examined this rationale and found it wanting. The court noted that the City paid fully litigated claims under $1,000 and the court questioned whether the practice would reduce interest costs since interest would accumulate at the statutory rate on the unpaid judgments. *Id.* The *Evans I* court could "discern no rational basis for the City's challenged classification." *Id.* at 1300.

The City urges us to reverse this finding and find that its practice does not violate equal protection. In addition to the reasons presented to the court in *Evans I*, the City presented other explanations of its practice at the second trial. A former city comptroller testified that the prioritization was designed to accommodate a large number of small tort judgment creditors and reduce the total number of creditors waiting for payment. Since a large number of small judgments could be paid with the limited amount of money in the 395 Fund, the total number of judgment creditors awaiting payment at any one time could be reduced. Small judgment holders were thus spared the lengthy waits experienced by large judgment holders and the City argues that plaintiffs failed to prove that the priority payments to small judgment creditors actually increased the delays experienced by large judgment creditors.

The reasons presented by the City for the practice are by no means compelling. While the policy choice to pay judgments under $1,000 before paying judgments over $1,000 may not be a civics textbook example of good government, this court does not judge governmental actions by that standard. A governmental classification that does not affect a suspect class or fundamental right must be upheld "unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government." Nowak, Rotunda, Young, *Constitutional Law* (2d ed. 1983). Governments must be given wide latitude in these types of regulations. *City of Cleburne*, 473 U.S. at 440; *Vaden*, 809 F.2d at 365. If a government decision is improvident, the political process and not the court has the responsibility for rectifying any error. *City of Cleburne*, 473 U.S. at 440.

Under this extremely deferential standard, it is clear that the classification system set up by the City should not be struck down by this court. The City offered a number of reasons for its classification system. Most importantly, at the second trial the City argued that paying off smaller judgments early satisfied more claimants; without such a bifurcation of payments, all tort judgment creditors would have experienced lengthy delays. The district court found that the purpose of satisfying more claimants was invalid. However, we find nothing to indicate that such a goal is impermissible. The purpose behind a government enactment need not be laudatory—to pass constitutional muster, the purpose must simply be legitimate. If the court can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Vicious or irrational discrimination violates the equal protection clause. *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). No such discrimination is evident in this case. At

worst, the City is merely attempting to satisfy as many individual claimants as possible with the limited revenues available. The City's practice of paying small tort judgments in advance of larger ones does not violate the equal protection rights of the holders of large tort judgments. This court's finding in *Evans I* that the City's practice violated equal protection was clearly erroneous and must be reversed.

C. *Evans II* Equal Protection

At the second trial, plaintiffs presented and the district court approved a second theory of liability. The district court found that the City's practice of delaying tort judgment payments from the 395 Fund while paying other nontort judgments promptly was a separate equal protection violation. In essence, the district court held that to avoid violating the equal protection clause, the City must establish a single order of payment for all judgments of any kind entered against it. The district court also found that since the City was able to pay some types of judgments, such as enterprise or contract judgments, in a timely manner it must raise enough revenue to pay off all outstanding judgments just as promptly. The district court held that the City's "chronic underbudgeting" was itself a violation of equal protection. The court found that the City could not claim poverty as an excuse for delaying payments to some creditors while at the same time promptly satisfying the claims of others; the court discounted the City's budgetary policy of keeping separate accounts and found that there could be no rational distinction between the tort judgment owned by the plaintiffs and other judgments paid off in a preferential manner by the City.[14]

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[14] The plaintiffs also argue that, beyond its practice of classifying and prioritizing judgments under its budgetary scheme, the City also often paid judgments out of order for unknown or sus-

(Footnote continued on following page)

Under the City's budgetary scheme, judgments are to be paid out of different city funds depending on the origin of the claim. Enterprise judgments are paid from revenues generated by the enterprises themselves. Contract judgments are paid from departmental funds. Judgments arising out of employment-related litigation are usually payable from the personnel budgets of the affected departments. The 395 Fund is supposed to pay for all remaining tort judgments. The 395 Fund is a special revenue fund that can only be used for a defined purpose—part of the property tax is earmarked for that purpose. The City argued that this system of budgeting made it impossible to pay off all judgments on an equal basis. The district court was unconvinced. While acknowledging that the City's system of budgeting may have made good accounting sense, the court found that it could not explain the disparate treatment. The court noted that tort judgments could also have been charged to specific departments, as other judgments were. Alluding to the personnel judgments charged to departments, the court noted that the City had stated that such matching of costs to departments would act as a deterrent to future misconduct. The court reasoned that other kinds of conduct leading to tort judgments, such as police brutality cases, should be charged back to departments as well. The court found the City's differentiation between tort and nontort judgments to be irrational.

In reviewing this holding by the district court, we must again apply the rational basis test of equal protection to the City's practice. Under this standard, the City's budgetary scheme does bear some rational relationship to legitimate state ends. The City's practice of charging

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[14] *continued*
picious reasons. As an example of such conduct, the plaintiffs note that money was paid promptly for injuries sustained when former Mayor Daley's limousine hit another car. The district court found that there was insufficient evidence to prove that the City had a custom or practice sufficient to trigger 42 U.S.C. § 1983 and we will not disturb that finding.

judgments incurred by enterprise funds to those funds seems rationally related to the concept of such a fund—a self-sustaining or break-even operation supported by its users. Charging departmental budgets for contract damages conforms to the normal accounting practice of matching expenditures to the appropriate entity that incurred the liability. Similar rational reasons exist for charging personnel damages to the involved department. The 395 Fund is by law a special revenue fund and can only be used for its defined purpose.

The district court found fault with this system and while it may not be perfect, we do not believe that it sinks to the level of being irrational. Under the equal protection analysis, the City's practices can be rationally related to the legitimate interests involved in maintaining a workable budgetary scheme. It is not this court's province to prescribe the budgetary workings of the City of Chicago. Such things are beyond the expertise of the judiciary. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973). While it may have been more logical, as the district court pointed out, to charge all judgments back to the responsible departments, the City's lack of symmetry in its policy does not constitute an equal protection violation. *See Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) (failure of state to make perfect classifications not equal protection violation).

Likewise, the district court's holding that the equal protection clause demands that the City raise more tax revenue to meet all obligations promptly is not warranted under the rational basis test. A City must consider many things when assessing taxes. Determining an appropriate level of taxation is fundamentally a local decision. As Justice Powell noted, "we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenue." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 41. This court must avoid attempting to determine for itself whether the City is able to raise more revenue. Such

a decision is better left to local taxpayers acting through their elected officials. The City's alleged failure to raise adequate revenue to quickly meet all its tort judgment obligations does not violate equal protection.

The district judge advanced some worthy ideas, but they are for the City's self-determination, and will not be imposed by this court. It is regrettable that this matter which has lingered so long now takes a new and possibly unexpected turn, but what we now view as error must be arrested even at so late a date. Improvements in this situation are better left to the state and municipal governments.

III. CONCLUSION

Our decision in *Evans I* was clearly erroneous in its conclusion that the City's practice of prioritizing tort judgments under $1,000 denied the plaintiffs the equal protection of the laws. To that extent we overrule *Evans I*.[15] We find that the City's failure to establish a single order of payment of all judgment creditors did not violate equal protection. Therefore, the decision of the district court is REVERSED. Costs are waived.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[15] There is some question as to what effect we must give to the due process language in *Evans I*. *See supra* note 11. The district court in *Evans II*, while acknowledging the due process findings in *Evans I*, did not base its holding on any due process violation. The district court decided this case solely on equal protection grounds and damages were awarded on that basis alone. The parties to this appeal also did not raise any issue of due process. The due process claim has not survived to this stage of the litigation.

[Dated May 31, 1984]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SYLVIA EVANS, Administrator of the Estate of ANDREW EVANS, Deceased,

Plaintiffs,

vs.

CITY OF CHICAGO, CLARK BURRUS & WILLIAM R. QUINLAN,

Defendants.

BERTHA BALARK, et al.,

Plaintiffs,

vs.

CITY OF CHICAGO, et al.,

Defendants.

Nos. 77 C 4119 & 79 C 1939
Consolidated cases — Judge Grady

CONSENT DECREE

NOW COME the plaintiff classes, represented by SYLVIA EVANS, Administrator of the Estate of Andrew Evans, and BERTHA BALARK, DANA BALARK, ANNE BALARK and DANE BALARK, by and through their respective attorneys, JOHN BERNARD CASHION and EDWARD T. STEIN; and the defendants, CITY OF CHICAGO, CLARK BURRUS, DANIEL GRIM and WILLIAM QUINLAN, by and through their attorney, JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, and stipulate and agree as follows:

I.

DEFINITIONS

For the purposes of this Consent Decree, as used herein, the following terms have the meanings indicated:

1. "Judgment": A court entered order for money damages (including interest) and/or for costs or attorneys fees (whether on an interim or final basis), obtained by settlement, finding, or verdict in a tort suit arising under the constitution or laws of a state, or the Constitution of the United States or under 42 U.S.C. §1981 through §1988.

2. "Attorneys Fees": Court awarded fees to counsel arising out of an action which results in a "judgment".*

3. "Judgment Creditor": The individual or entity to whom a "judgment" is payable.

4. "Assignee": The owner of a "judgment" who obtained same by purchase or in exchange for other valuable consideration.

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* The court believes, and the parties agree, that ordinarily there would be no justification for requiring the City to pay plaintiffs' attorneys fees prior to the time the City pays the money judgment involved in the case. Accordingly, judgments for attorneys fees in cases involving money damages are subject to the terms of this Consent Decree and will be paid, along with the damage awards, in the sequential order established herein for tort judgments. However, in cases which do not involve claims for money damages, such as cases where only injunctive or declaratory relief is sought, payment of a fee award out of sequence would not result in a preference of the attorney over the client. While this court assumes that for purposes of simplicity and uniformity attorneys fee awards in cases not involving money damages will ordinarily be paid in the same sequential order established in this decree for tort judgments, we nonetheless recognize that another court may in its discretion order current or immediate payment of attorneys fees in non-money damage cases in appropriate circumstances.

5. "Final Judgment": A "judgment" wherein the judgment is enforceable pursuant to the applicable rules of civil procedure; and a stay pending determination of post-trial motions and/or appeal has not been granted, or wherein the judgment is non-appealable either because all direct appeals are exhausted or time has expired as a matter of law, or because a waiver of appeal has been filed with the court wherein the judgment was entered.

6. "Anticipated liability"—is the estimated liability of the Defendant CITY OF CHICAGO for the fiscal year being budgeted based upon the total of the following calculation:

a) all final judgments unpaid as of the end of the previous fiscal year; plus

b) the actual amount of the judgments that became final during the 12 month period immediately preceeding submission of the proposed budget; plus

c) an amount equal to the estimated increase, if any, of final judgments for the year being budgeted, based on matters on appeal, pending post-trial motions, and other potential liabilities which the corporation counsel reasonably believes will be finalized during the year being budgeted.

II.

INTRODUCTION

1. These consolidated class action cases were brought by SYLVIA EVANS, Administrator of the Estate of Andrew Evans, on November 4, 1977, against the CITY OF CHICAGO, CLARK BURRUS and WILLIAM R. QUINLAN (*EVANS*); and by BERTHA BALARK, DANA BALARK, ANNE BALARK and DANE BALARK on May 14, 1979 against the CITY OF CHICAGO and DANIEL GRIM (*BA-*

LARK) in the United States District Court for the Northern District of Illinois.

2. The above-captioned matters seek declaratory and injunctive relief and damages against the Defendant City of Chicago and the individual Defendants in their official capacities and their successors in office, for their alleged policy and practice of delaying payment of judgments entered against them and their agents, servants and employees; and the further alleged policy and practice of prioritizing the payment of judgments of $1,000 and under in advance of judgments greater than $1,000. The complaints allege that the Defendants' practices deprive the respective Plaintiffs of their fourteenth amendment rights to due process and equal protection of the laws.

3. Jurisdiction in this court is predicated upon 28 U.S.C. §1343 pursuant to 42 U.S.C. §1983.

4. By order of January 2, 1980, the *Evans* Plaintiffs were certified as a Rule 23(b)(3) class. The *Evans* class is defined as follows:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to Pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill. Rev. Stat., ch. 85, §9-104(a); or (b) to commence timely payment of installments on the judgment pursuant to Ill. Rev. Stat., ch. 85, §9-104(b) no later than the end of the first fiscal year following entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago.

See also, Evans v. City of Chicago, 522 F.Supp. 789, 803 (N.D. Ill. 1980).

5. By order of August 15, 1980, the *Balark* Plaintiffs were certified as a Rule 23(b)(2) class.

The *Balark* class is defined as follows:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year following the year in which the judgment was obtained.

See Id., 522 F.Supp. at 810.

6. The respective Plaintiffs claim that the alleged policies and practices of the Defendants as set forth in paragraph 2 above have created a backlog in the payment of judgments entered in state or federal court.

7. The method of payment of judgments and Defendants' budgeting of funds to pay said judgments was based in part on Defendants' interpretation and reliance on Ill. Rev. Stat. 1981, ch. 24, §8-1-16 and Ill. Rev. Stat. 1981, ch. 85, §9-104.

8. In its March 21, 1979 Memorandum Opinion, the District Court construed the Illinois statutes which govern the payment of tort judgments (Ill. Rev. Stat. 1981, ch. 85 §9-104) and which authorize a judgment tax levy (Ill. Rev. Stat. 1981, ch. 24 §8-1-16) as follows:

> It now appears to us that . . . Section 8-1-16, . . . is merely an authorization for a special levy, to be known as the "judgment tax," from which judgments are to be paid in accordance with ch. 85, Section 9-104. In other words, Section 9-104 controls the disbursement of all monies, including those collected under Section 8-1-16, which are to be applied to tort

judgments. We find nothing in the statutes which either requires that judgments be paid out of the fund established by the "judgment tax", or permits a municipality establishing such a tax to disregard the provisions of Ch. 85.

9. On January 28, 1981, the District Court entered partial summary judgment in favor of the Plaintiffs, ruling that the alleged policies and practices of the Defendants, as herein described, deprived Plaintiffs of due process and equal protection of the law. *Evans v. City of Chicago, supra.* That order was affirmed on appeal as to the equal protection claim. *Evans v. City of Chicago,* 689 F.2d 1286 (7th Cir. 1982). The claim regarding the deprivation of due process of law was remanded to the District Court for further proceedings.

10. The City's 1983 budget discloses that $9,769,823 was appropriated to pay judgments. This included Cash on Hand on January 1, 1983 of $220,000; taxes receivable of $549,823; and the current tax levy for 1983 of $9,000,000.

11. As of June 7, 1983, there were estimated outstanding judgments of $11,296,477. This includes:

Judgments that became final prior to 1982, including interest	1,037,421
Judgments that became final in 1982, including interest	3,813,339
1983 Judgments to date, including interest	2,885,806
Judgments on appeal, including interest	2,561,367
Judgments not certified as final, including interest	998,544
Total	11,296,477

The City anticipates that the second half of fiscal 1983 will reflect an additional $3,000,000 in judgment liability.

12. The City estimates that it will become liable to pay final judgments in an amount no less than $6,500,000 in fiscal 1984 and no less than $7,000,000 in fiscal 1985, with interest, costs and attorneys fees.

III.

PURPOSES OF CONSENT DECREE

1. The parties state that they are entering into this Consent Decree for the purpose of avoiding the further expense of protracted litigation over the matters resolved and decided by this Consent Decree. The parties intend this Consent Decree to fully and finally resolve the budgetary and equitable aspects of Plaintiffs' class complaint, reserving only plaintiffs' claims for damages and claims for attorneys' fees. All equitable and legal rights of the plaintiffs are merged into this Consent Decree unless otherwise specified.

2. This Consent Decree shall govern the defendant CITY OF CHICAGO'S method and manner of payment to present and prospective judgment creditors, in accordance with this Court's construction of Ill. Rev. Stats. ch. 24, §8-1-16 and Ill. Rev. Stats. ch. 85, §9-104, as outlined in Section II, paragraph 8, above.

3. The parties hereto agree that the execution of this Consent Decree is not and shall not be construed as an admission of liability by the Defendants, nor shall it be deemed to be evidence of the validity of any such claims or their liability for any such claims or of any unlawful acts by Defendants whatsoever. This Consent Decree, or any of the terms hereof, shall not be offered or received

in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by Defendants, nor of their legal position in this or other litigation.

4. The parties hereto expressly reserve their respective rights to fully assert and defend against any claim or claims to damages and attorney's fees arising out of the policies or practices alleged to have violated Plaintiffs' right in this matter.

5. In consideration of the execution of this Consent Decree, the Defendants, CITY OF CHICAGO, et al., and the Plaintiffs as class representatives, hereby covenant and agree to abide by the Terms of Settlement described in this Consent Decree, thereby fully settling all matters decided therein. The parties, as indicated by the signatures of their counsel below, who are acting with express authority from their respective clients, have determined to finally settle Plaintiffs' claims as described herein by entry of this consent decree subject only to notice to the class and hearing on January 9, 1983 to determine whether the proposed settlement as provided by this Consent Decree should be approved by the court under Rule 23(e) of the Federal Rules of Civil Procedure.

IV.

TERMS OF SETTLEMENT

1. In consideration of the execution of this Consent Decree and the Release herein contained, and in consideration of the dismissal of this lawsuit in all respects, with prejudice and without costs and/or attorneys' fees, against Defendants CLARK BURRUS, Defendant DANIEL GRIM and Defendant WILLIAM QUINLAN, individually and as past Comptrollers and Corporation Counsel, respectively,

of the City of Chicago, Defendant CITY OF CHICAGO hereby convenants and agrees to do the things and perform the acts described herein, at the time and in the manner set forth in this Decree, all of which shall be subject to the conditions set forth herein.

2. It is agreed that as to the matters resolved herein, the parties waive trial by jury and agree to trial instanter before this Honorable Court.

3. Plaintiffs understand, upon advice of counsel, and agree that except as otherwise provided herein, this Decree is a final and total settlement of all claims they now have or may have in the future, arising either directly or indirectly out of or related to Ill. Rev. Stat. 1981, ch. 85 §9-104 and Ill. Rev. Stat. 1981, ch. 24 §8-1-16, as well as under the United States and Illinois Constitutions, except for claims for damages and attorneys fees, as hereinafter specified; and that such finality is applicable to the defendants, the City of Chicago, and its officers, agents and employees.

4. The plaintiffs, their agents and assignees hereby expressly reserve the issue of damages and attorney fees arising out of the matters which were the basis of this litigation.

5. The Defendant CITY OF CHICAGO, its agents, servants and employees are permanently enjoined from paying final judgments other than by the date of their entry by a court of competent jurisdiction.

Nothing in this paragraph is intended to prohibit payment of final judgments which "relate back" to an earlier judgment date pursuant to the entry of such an order by a court of competent jurisdiction, for example, in a subsequent award of attorney's fees or costs. In such cases where a specific "relation back" Order is entered, De-

fendants shall schedule payment in accordance with the earlier "judgment date" which gives effect to the final judgment.

6. Nothing in this decree is intended to prevent the parties to a suit from entering into a structured settlement, or a final settlement which assumes periodic payment of sums of money over a period of time established by the settlement, provided that such settlement is in good faith compliance with the terms of this Consent Decree and subject to the approval of the court before whom the case is pending.

7. For fiscal 1984, the Defendant CITY OF CHICAGO shall appropriate an amount which is expected to be sufficient to satisfy payment of all final judgments which remain unpaid as of December 31, 1983, plus payment of one-half of the estimated liability of the CITY OF CHICAGO for payment of judgments to become final in 1984. In no event shall Defendant CITY OF CHICAGO appropriate less than Thirteen Million Five Hundred Thousand ($13,500,000) Dollars for the payment of judgments in 1984.

8. For fiscal 1985, the CITY OF CHICAGO shall appropriate an amount which is expected to be sufficient to satisfy payment of the full "anticipated liability" of the CITY OF CHICAGO for fiscal 1985. In no event shall defendant CITY OF CHICAGO appropriate less than Twelve Million ($12,000,000) Dollars for the payment of judgments in 1985.

9. For all subsequent fiscal years, the Defendant CITY OF CHICAGO shall submit to the City Council a request for an appropriation of monies sufficient to satisfy payment of the full "anticipated liability" of the CITY OF CHICAGO for payment of judgments for the ensuing fiscal year.

10. Processing of tort judgments entered against the CITY OF CHICAGO, its agents, servants employees thereafter, shall be administered in the following manner:

(a) Upon receipt of the certified copy of a Judgment Order, the Office of the Corporation Counsel shall prepare a transmittal letter and waiver of appeal. These documents (the Certified Copy of Judgment, Waiver of Appeal and Transmittal Letter) shall be delivered to the Office of the Comptroller no later than ten (10) working days after receipt of the Certified Copy of the Judgment in the Office of the Corporation Counsel.

(b) Subsequent to receipt of the transmittal letter, the Office of the Comptroller shall notify counsel for the plaintiff of the procedures for payment. Notice shall be mailed by 1st class mail directly to said counsel, at the current office address of counsel. Said notification shall include information concerning all forms and documents which must be executed in order for a check to be issued (i.e., waiver of attorney's lien, welfare lien, medical lien, satisfication of judgment, etc.) and the date by which said documents must be received in the Office of the Comptroller in order for payment to be processed.

(c) In the event that the counsel for a judgment creditor cannot be located, the Office of the Comptroller shall proceed to notify the judgment creditor directly, at the address listed on the transmittal letter.

(d) Payment and notification procedures for judgment creditors not represented by counsel shall follow the same procedures as for judgment creditors who are represented by an attorney. In the event the notification mailed to counsel or a *pro se* judgment creditor is returned undelivered, an officer or employee of the CITY OF CHICAGO shall be designated to trace the whereabouts of any such counsel or *pro se* judgment creditor. Such designated person(s) shall keep a detailed record of the actions taken to dis-

cover the whereabouts of each such counsel or judgment creditor.

(e) Checks in payment of judgments shall be made payable to the judgment creditor and his/her attorney(s), and shall include interest to the date of issue.

(f) Payment of judgment creditors from the date of entry of this Order until May 31, 1985 shall be made when funds become available for payment. Sums budgeted for 1984 and 1985 shall be made available for disbursement in ten (10) monthly installments for each month from March through December of that year.

11. Payment of tort judgments entered against the CITY OF CHICAGO, its agents, servants and employees beginning June 1, 1985 and for subsequent years thereafter shall be processed in the following manner:

(a) The Office of the City Comptroller, in the ordinary course of business, issues checks in payment of tort judgments once a month. In order for a check in payment of a particular judgment to issue, the Office of the Comptroller must receive all necessary documents by a certain date each month so that vouchers for payment can be processed. Once said deadline is reached, no further payments can be processed that month.

(b) The notification provided to the Judgment Creditor or his/her attorney (described in paragraph 9(b), above) shall specify the date of the month by which all necessary documents must be received in order for the payment to be processed that month. If the necessary documents are delivered to the Office of the Comptroller by the date specified in the notification, the judgment shall be processed in that month for payment.

(c) In the event that the necessary documents are not received by the date specified in the notification, the payment of that judgment shall be processed in the following month.

(d) Payment of judgment creditors beginning June 1, 1985 and for subsequent years thereafter shall follow the procedures outlined in subparagraphs (a) through (c) above. Effective June 1, 1985, the Office of the Comptroller shall issue a check in payment of judgments within forty-five (45) days of receipt of all executed documents.

12. In the event that all funds allocated for the payment of tort judgments have been exhausted, the time restrictions of paragraph 10 with respect to payment of tort judgments shall be suspended until such funds become available. All other provisions in paragraph 10 shall remain in full force and effect. When additional allocated funds become available for payment of tort judgments, all judgments due to be paid during the suspension period for which the proper documentation has been provided shall be paid immediately.

13. The CITY OF CHICAGO, through the Office of the City Comptroller, shall maintain a computerized program for purposes of monitoring the payment of tort judgments.

(a) Said computerized program shall include the following date with respect to each final judgment: the name and address of each judgment creditor; the name and address of the attorney for each judgment creditor; the name of any assignees, if known; the court docket or incident number; the date judgment was entered by the court; the amount of judgment, costs and/or attorneys fees allowed; the "Comptroller's number" indicating the annual sequence number of the judgment, e.g. 84-01; a brief description of the basis of the suit, e.g. Civil Rights, Defective Sidewalk; the voucher number and date of issue of the check for payment of each judgment, once said judgment is paid.

(b) The computerized process shall have the capability of printing out at least monthly the entire data stored as to each judgment paid or payable including

reports as to new entries and judgments paid per month, and to print out selectively each item of data as requested.

Implementation of these procedures shall be completed within ninety (90) days of this Order.

14. A final judgment shall be payable according to its date of entry by the court and not by reference to its certification as final and nonappealable by the Corporation Counsel, nor by reference to a later affirmance on appeal, in the event the CITY OF CHICAGO appeals from any judgment.

15. Beginning February 1, 1984 through April 1, 1985, the CITY OF CHICAGO shall publish once each month a notice indicating the month and year of judgments which are currently being paid by the Office of the City Comptroller. Such notice will be posted in the reception area of the Office of the Comptroller, Room 501, City Hall, 121 North LaSalle, Chicago, Illinois.

V.

REPORTING

1. The Defendant CITY OF CHICAGO shall submit to the *Evans* and *Balark* attorneys on or before September 15, of 1984, 1985, 1986 and 1987, a detailed report which shall reflect the full liability of the CITY OF CHICAGO for judgments (whether entered against it or its agents, servants or employees) which are due and owing as of August 31 of that year.

2. Within fourteen (14) days of receipt of the report, set forth in 1 above, counsel for the respective Plaintiffs may request in writing additional information with respect to said report. Said information shall be provided within fourteen (14) days of the request. Within fourteen (14)

days thereafter either of Plaintiffs' counsel may petition this Court for appropriate relief.

VI.

ADDITIONAL TERMS

1. The Court will retain jurisdiction over this matter to enforce and/or modify the provisions of this decree including matters related to Reporting as set forth in §V, *supra.*

A copy of this Consent Decree shall be given to the current Corporation Counsel, Comptroller, and the Budget Director.

Enter:

Dated: May 31, 1984

/s/ JOHN F. GRADY
JOHN F. GRADY, Judge
United States District Court
for the Northern District
of Illinois

Agreed to:

/s/ JOHN B. CASHION
JOHN B. CASHION,
Attorney for the
Evans Plaintiffs

/s/ JAMES D. MONTGOMERY
JAMES D. MONTGOMERY,
Corporation Counsel of the
City of Chicago
Attorney for Defendants

/s/ EDWARD T. STEIN
EDWARD T. STEIN
SINGER & STEIN
Attorneys for the *Balark Plaintiffs*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 81-1150 & 81-1344

SYLVIA EVANS, Administrator of the Estate of ANDREW EVANS, Deceased,

Plaintiff-Appellant,
Cross-Appellee,

v.

CITY OF CHICAGO, CLARK BURRUS and WILLIAM R. QUINLAN,

Defendants-Appellees,
Cross-Appellants,

and

BERTHA BALARK, DANA BALARK, ANNE BALARK and DANE BALARK, by themselves and for all others similarly situated,

Plaintiffs-Appellants,
Cross-Appellees,

v.

CITY OF CHICAGO, a municipal corporation; and DANIEL GRIM, as Comptroller of the City of Chicago,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 77 C 4119 & 79 C 1939—John F. Grady, *Judge.*

ARGUED MAY 28, 1981
RE-ARGUED JANUARY 6, 1982—DECIDED SEPTEMBER 27, 1982

Before SWYGERT and FAIRCHILD, *Senior Circuit Judges*, and THOMAS, *Senior District Judge.**

FAIRCHILD, *Senior Circuit Judge*. After five days of trial in the Circuit Court of Cook County, Sylvia Evans settled her action against the City of Chicago (City) for the wrongful death of Andrew Evans. On January 30, 1976, the settlement resulted in the entry of a $67,500 judgment against the City.

In 1977, Bertha, Dana, Anne, and Dane Balark brought a civil rights action under 42 U.S.C. § 1983 against six City policemen. The parties settled that case. On April 10, 1979, the United States District Court, by stipulation, entered a judgment awarding $4,250 to each of the four Balarks. Ill. Rev. Stat., ch. 85, § 9-102 directs the City to pay tort judgments incurred by its employees while acting within the scope of their employment.

After learning that the City would delay paying the judgments for a considerable period, Evans and the Balarks brought separate 42 U.S.C. § 1983 class action suits, which raise constitutional challenges to: (1) the City's practices of (a) delaying payment of tort judgments and (b) paying tort judgments of $1,000 and less before paying larger judgments; and (2) certain Illinois statutes[1] which authorize or reflect the City's practices.

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* Senior District Judge Daniel Holcombe Thomas of the Southern District of Alabama sitting by designation.

[1] The challenged statutes are Ill. Rev. Stat., ch. 24, § 8-1-16 and ch. 85, § 9-104. Ill. Rev. Stat., ch. 24, § 8-1-16 provides:

> "In any municipality with a population of 500,000 or more the corporate authorities may levy a tax annually upon all the taxable property in the municipality at a rate that will produce not to exceed $4,500,000 upon the valuation to be ascertained by the assessment of such property for purposes of taxation for the year in which each such levy is made. This tax, if levied, shall be for the purpose of paying judgments entered against the municipality prior to January 1, 1941, and tort judgments and judgments for damage to or for the taking of private property for public use entered after January 1, 1941. This tax shall be levied and collected in the same manner as the general taxes of

(Footnote continued on following page)

[1] *continued*

the municipality. It shall be known as the judgment tax and shall be in addition to the maximum of all other taxes which the municipality is now, or may be hereafter, authorized by law to levy upon the aggregate valuation of all taxable property within the municipality.

"All money received from this tax shall be set apart in a separate fund and shall be used solely for the purpose of paying judgments as provided for in this section. Judgments against the municipality shall be paid out of this fund in the order in which the judgments were obtained. This order of payment shall not apply to judgments of $1,000 or less, which judgments may be paid out of said order and in the order in which these judgments of $1,000 or less were obtained.

"Interest accrued on these judgments shall be paid with the principal thereof. However, the interest accrued to any particular date on all judgments payable out of this fund may be paid ratably at any time without payment of the principal thereof. Warrants issued in anticipation of the judgment tax under the provisions of Sections 8-1-11 and 8-1-12 shall bear interest at a rate not to exceed 7% per annum."

Ill. Rev. Stat., ch. 85, § 9-104 provides:

"(a) If a local public entity does not pay a tort judgment or settlement during the fiscal year in which it becomes final and if, in the opinion of its governing body, the unpaid amount of the tort judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the balance of the judgment during the ensuing fiscal year.

"(b) If the local public entity does not pay the tort judgment or settlement during the fiscal year when it becomes final and its governing body is of the opinion that the unpaid amount of the judgment or settlement is so great that undue hardship will arise if the entire amount is paid out of the revenues for the ensuing fiscal year, the governing body shall pay the judgment or settlement, with interest thereon, in not more than 10 annual installments. Each payment shall be of an equal portion of the principal of the tort judgment or settlement. The governing body, in its discretion, may prepay any one or more installments or any part of an installment."

I. The City's Practice

The City pays tort judgments[2] of $1,000 or less as soon as the judgment holders present proper documents. After paying those judgments, the City applies the remainder of its tort judgment fund to pay all other tort judgments in the chronological order in which the Comptroller's staff has listed them in a bound book, called the "Judgment Record." The Comptroller's staff lists a judgment in the "Judgment Record" upon notification from the Corporation Counsel that all appeals have been completed or waived.[3]

In 1977, the waiting period for payment of tort judgments in excess of $1,000 was 36 months. In 1978, the period had increased to 41 months. In July 1979, the City owed $14 million in tort judgments. By September 1979, the waiting period had reached 47 months. The City pays interest at the statutory 6% rate at the time it pays the judgment. *See* Ill. Rev. Stat., ch. 74, § 3, repealed and recodified, 1981 Ill. Laws 82-280 §§ 19B-101 and 2-1303.

The delay in paying judgments resulted from the City's practice of: levying a $4.5 million tax each year for payment of tort judgments (an amount far less than the amount needed to pay the judgments entered against the City each year); selling tax anticipation notes for 75% of the levy; making the funds from the notes available to pay tort judgments; paying the principal and interest on the notes from the receipts of the tax levy; using the balance of the tax levy receipts to pay tort judgments; and refusing to apply any other revenue to paying tort judgments.

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[2] The City reduces to judgments all settlements in tort cases where suits have been filed against it. The City characterizes judgments in federal civil rights suits as tort judgments. This opinion adopts the City's characterization.

[3] Some confusion persists as to whether the City pays judgments which exceed $1,000 in the order of entry by the court or in the order of entry into the Comptroller's "Judgment Record." The defendants do not contend that this confusion concerns a material fact.

Eighty percent (80%)[4] of those who win tort judgments for more than $1,000 against the City sell their judgments. The purchasers buy the judgments at a discount which reflects their forecast of the length of the delay in payment and the difference between the prevailing market interest rates and the statutory interest rates.[5] In February 1976, some assignors discounted their judgments 13%. In 1980, discounts reached 20%. The plaintiffs assert that the discount rate subsequently reached 25%.

II. The District Court's Orders

The district court certified both the *Evans* and the *Balark* cases as class actions. The district court's class certifications group original tort judgment holders according to the length of time their judgments remain outstanding. Original tort judgment holders who were not paid before the end of the fiscal year following the fiscal year in which their judgments were entered are in the *Evans* class.[6] Shorter-term original tort judgment

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[4] We employ the plaintiffs' attorneys' representation to the trial court that 80% of the original holders of tort judgments assigned the judgments. (Tr. 10/15/80 at 8.) The defendants assert that up until 1979 discounters purchased 85 to 90% of the tort judgments against the City. We do not find the percentage of assignees relevant to our disposition.

[5] Prior to October 1, 1977, money judgments drew 6% interest per year. From then until January 1, 1980, judgments against the City and other governmental entities drew interest at 6% but other judgments drew 8%. Since January 1, 1980, judgments against non-governmental entities draw 9%. *See* Ill. Rev. Stat., ch. 74, § 3, repealed and recodified, 1981 Ill. Laws 82-280 §§ 19B-101 and 2-1303. *See also* 1979 Ill. Laws 81-874 § 1; 1977 Ill. Laws 80-722 § 1 and 80-914 § 1.

When the City, pursuant to Ill. Rev. Stat., ch. 85, § 9-102 pays judgments incurred by its employees acting within the scope of its employment, it apparently pays 6% interest.

[6] The *Evans* class was defined in a January 2, 1980 Order of Court to include:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will

(Footnote continued on following page)

holders comprise the *Balark* class.[7] *Evans v. City of Chicago*, 522 F.Supp. 789, 808 (N.D. Ill. 1980). The classification does not distinguish between judgments stemming from state law tort claims or federal civil rights claims; nor between judgments against the City alone or against both municipal officers or employees and the City. The court foresaw class members moving to the *Evans* class from the *Balark* class if they remained unpaid upon the conclusion of the fiscal year following the fiscal year in which their tort judgments were entered. 522 F.Supp. at 808-809.

On January 28, 1981, the district court consolidated the *Evans* and *Balark* cases for all future action including appeal. In response to the plaintiffs' motions for partial summary judgment and immediate payment, the district court, on January 28, 1981: (1) directed the City to pay immediately to all unpaid *Evans* class members

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[6] *continued*

have been entered commencing with the fiscal year 1972 and continuing to the date of the entry of final judgment in this case and payment of whose judgment is overdue by reason of the failure of the City of Chicago (a) to pay the judgment in full in the fiscal year it was entered or in full during the ensuing fiscal year in accordance with Ill. Rev. Stat., ch. 85, § 9-104(a); or (b) to commence timely payment of installments on the judgment pursuant to Ill. Rev. Stat., ch. 85, § 9-104(b) no later than the end of the first fiscal year following entry of judgment. The class shall not include assignees or purchasers of judgments nor those persons who assigned, factored or "discounted" their judgments prior to full or partial payment by the City of Chicago.

Evans v. City of Chicago, 522 F.Supp. 789, 803 (N.D. Ill. 1980).

[7] The *Balark* class was defined in the August 15, 1980 Memorandum Opinion of the Court to include:

> All persons in whose favor a final tort judgment in excess of $1,000.00 against the City of Chicago has been or will have been entered commencing with fiscal year 1974 who have held their judgments without full satisfaction thereof for a period not greater than the end of the fiscal year following the year in which the judgment was obtained.

522 F.Supp. at 810.

their judgments, costs, and unwaived statutory interest (Order, ¶8); (2) declared that Ill. Rev. Stat., ch. 85, § 9-104(b) failed to provide adequate procedural safeguards to the plaintiffs and other tort judgment holders and, on its face, violated the Fourteenth Amendment of the United States Constitution (Order, ¶4); (3) specified the minimum procedural safeguards constitutionally required before the City may decide to pay tort judgments in ten annual installments as permitted by Ill. Rev. Stat., ch. 85, § 9-104(b) (Order, ¶4); (4) enjoined the defendants' practice of paying judgments of $1,000 or less before earlier-entered, larger judgments (Order, ¶9); (5) declared the practice and Ill. Rev. Stat., ch. 24, § 8-1-16, to the extent the statute authorized the practice, unconstitutional for denying the plaintiffs equal protection of the laws (Order, ¶¶5 & 6); (6) reserved the question of attorneys' fees (Order, ¶10); and (7) declared the judgment final and appealable pursuant to Fed. R. Civ. P. 54(b) (Order, ¶7).

The plaintiffs appeal and the defendants cross-appeal from the January 28, 1981 order.[8]

III. The Plaintiffs' Appeal

The plaintiffs argue that the district court erred (1) in not holding Ill. Rev. Stat., ch. 85, § 9-104(a) facially unconstitutional on a motion for summary judgment; and (2) in certifying an impermissibly narrow subclass for immediate payment.

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[8] On February 2, 1981, subsequent to the filing of this appeal, the district court, in response to a motion by the plaintiffs for summary judgment on the issue of immediate payment, denied requests (1) to declare Ill. Rev. Stat., ch. 85, § 9-104(a) unconstitutional on its face; (2) to require the City to make immediate payment of all tort judgments which were older than thirty (30) days and had been entered against it during the 1980 fiscal year; and (3) to require the City to pay immediately assignees of all unpaid tort judgments. The district court did not approve 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 54(b) certification for any of its February 2 rulings.

A. Constitutionality of Ill. Rev. Stat., ch. 85, § 9-104(a)

The plaintiffs argue that Ill. Rev. Stat., ch. 85, § 9-104(a) is unconstitutional on its face because at the moment a judgment is entered Illinois law grants the judgment holder a property right in the judgments; because a taking occurs from the date a judgment is entered against the City until the judgment is satisfied; and because § 9-104(a) permits such takings without providing for a hearing at a meaningful time and in a meaningful manner. The district court, in rendering the decision which it made final under Rule 54(b), did not reach plaintiffs' challenge to the constitutionality of § 9-104(a). Therefore the issue is not before us.

B. Class Definition

The entry of a final judgment under Fed. R. Civ. P. 54(b) allows this court to review the determination of the class found entitled to relief. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). *See also Monarch Asphalt Sales Co. v. Wiltshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975) (class action reviewed on Rule 54(b) appeal by litigants denied intervention). *But see West v. Capitol Federal Savings and Loan Ass'n*, 558 F.2d 977, 982 (10th Cir. 1977) (Rule 54(b) final judgment of dismissal against putative class members does not make denial of a class certification appealable by named plaintiffs).

The plaintiffs argue that the district court certified an impermissibly narrow subclass for immediate payment. The formula "an impermissibly narrow subclass for immediate payment" invites confusion between the district court's determination that the plaintiffs constitute two distinct appropriate classes, its determination of the relief to which its summary judgment entitled each of the distinct plaintiff classes, and its determination, pursuant to Rule 54(b), that there was no just reason to delay entry of a final judgment granting the immediate payment relief to which its summary judg-

ment entitled one of the plaintiff classes. We review the class determination, but we reject the plaintiffs' attempt to draw within that review the constitutionality of Ill. Rev. Stat., ch. 85, § 9-104(a), an issue not reached in the decision made final under Rule 54(b).

The plaintiffs assert that the impermissible narrowness resulted because the court did not include assignees in the classes represented by the named plaintiffs, but did base the subclass determination upon Ill. Rev. Stat., ch. 85, § 9-104(a), a statute which the plaintiffs challenged as facially unconstitutional on a motion for summary judgment. We reject the plaintiffs' contentions.

We will overrule a denial of class certification only if the denial constitutes an abuse of the district court's discretion. *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir. 1980). We apply the same standard to determine whether the district court certified an impermissibly narrow class.

1. Exclusion of Assignees From the Classes

None of the individual plaintiffs claim to be assignees. (Tr. 1/26/81 at 22.) An original judgment holder who does not purchase judgments at a discount has no interest which is furthered by delay. But an assignee who regularly purchases judgments at a discount may well have divergent interests. Although such an assignee may well want immediate payment of judgments already acquired, the assignee may balk at ending the systematic delays which make purchasing of judgments at discounts a potentially lucrative business. Furthermore, the district court judged that assignees were more likely than other tort judgment holders to be deemed to have waived their right to immediate payment.

In view of the sparse record and the class proponents' burden of showing the appropriateness of the class they propose, *see Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976), such considerations present questions of typicality and antagonistic interests sufficient to defeat the plaintiffs' claim that the district court abused its discretion when it declined to include assignees in the class

the named plaintiffs represented. *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220, 1221 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *See General Telephone Co. v. Falcon*, 50 U.S.L.W. 4638, 4641 n. 13 (June 14, 1982).

2. Basing Classes Upon A Challenged Statute

The remainder of the plaintiffs' argument on the class certification is primarily an attempt to prove that Ill. Rev. Stat., ch. 85, § 9-104 is unconstitutional and that consequently the *Balark* class is entitled to immediate payment. No final judgment determined the constitutionality of that statute or the validity of the *Balark* class' claim to present payment of their tort judgments. Our review of the district court's class determinations does not render those matters reviewable.

Furthermore, the plaintiffs' argument fails because it assumes that the district court must determine the validity of a challenged statute before the court may base class distinctions upon the statute's provisions. On the contrary, as long as diverse groups of plaintiffs may advance differing arguments against the validity of a statute or the statute's provisions render it more vulnerable to attack by one group, the district court does not abuse its discretion by defining the groups as distinct classes despite the fact that all the plaintiffs may advance one common argument alleging the facial unconstitutionality of the statute.

Ill. Rev. Stat., ch. 85, § 9-104, envisions two distinct contingencies: one in which the governing body of a local public entity believes the unpaid balance of a tort judgment is not too great to be paid in the fiscal year following the fiscal year in which the judgment becomes final and the other in which the governing body believes undue hardship will arise if the entire unpaid amount is so paid. As to any unpaid judgment, as long as the fiscal year after the year in which the judgment became final has not expired, there remains the possibility of compliance with the statute by full payment or commencement of installment payment. After the expiration of such

period, however, the statute no longer provides or implies any obstruction to entitlement to immediate payment. The specifications of the *Evans* and *Balark* classes recognize this difference in the position of a judgment holder depending on the age of his judgment. Despite the challenge to the statute's constitutionality, the district court did not err in using its provisions to place the plaintiffs in distinct classes.

IV. The Defendants' Cross-Appeal

The defendants argue[9] that the district court erred: (1) in refusing to abstain; (2) in holding that they deprived the plaintiffs of property within the meaning of the Fourteenth Amendment; (3) in ordering immediate payment; (4) in holding Ill. Rev. Stat., ch. 85, § 9-104(b) unconstitutional; (5) in declaring the minimum procedural safeguards required before the City may constitutionally decide to pay judgments in ten annual installments; and (6) in holding the priority given judgments of $1,000 or less a denial of equal protection.

A. Abstention

In a limited number of exceptional circumstances, the judicially created abstention doctrine properly may lead a federal court to decline to exercise its jurisdiction so that a state court or agency may decide an issue. The defendants argue that the district court erred by not abstaining under theories derived from *Younger v. Harris*, 401 U.S. 37 (1971) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[10] We disagree.

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[9] At oral argument the defendants abandoned their assertion that the plaintiffs had made knowing and intelligent waivers of their due process rights.

[10] The defendants do not contest the district court's rejection of abstention based on *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

The *Evans* suit began in November 1977; the *Balark* in May 1979. In June 1979, the defendants, who in the *Evans* case had already filed four motions to dismiss and two motions for summary judgment, filed motions which requested the district court to abstain in both cases. The motions called to the court's attention a state lawsuit, *Nebel v. City of Chicago*, 75 CH 700 (Cir. Ct. Cook Co. Ch.), which also challenged the City's practice of delaying payment of tort judgments. Nebel had filed suit on February 4, 1975. The *Nebel* suit was dismissed initially, but a September 27, 1977 Appellate Court decision established Nebel's right to proceed on behalf of the class of persons who held judgments against the City or its agents. *Nebel v. City of Chicago*, 53 Ill. App.3d 890, 369 N.E.2d 74 (1st Dist., 2d Div. 1977).

The district court, in an opinion dated July 9, 1979, denied the defendants' motion to abstain in *Evans*. In an opinion dated August 15, 1980, the district court applied its *Evans* ruling to the *Balark* case. *Evans v. City of Chicago*, 522 F.Supp. at 795-96.

On October 30, 1979, the state court certified the *Nebel* plaintiff class: "all unpaid tort judgment creditors of the defendant, THE CITY OF CHICAGO, as of the date of this order." *Waters v. City of Chicago*, 95 Ill. App.3d 919, 920, 420 N.E.2d 599 (1st Dist., 2d Div. 1981). On November 16, 1979, the parties in *Nebel* filed a stipulation regarding a proposed compromise. With minor modifications this stipulation forms the basis for the settlement of the state court case. The settlement provides: that the City allot $9 million in each of three annual budgets (1980, 1981, and 1982) to pay tort judgment creditors; that by January 1, 1983, the City will budget an amount sufficient to pay all outstanding tort judgments; that attorneys' fees be paid from those funds; and that a trustee administer the fund. On February 20, 1980, the *Nebel* court entered a final settlement order.

On January 28, 1981, the district court entered the judgment now here on appeal. On April 21, 1981, the Illinois Appellate Court vacated and remanded the *Nebel* settlement. The Appellate Court held that the trial

court's approval of the settlement was an abuse of discretion because holders of judgments of less than $1,000 were assessed for the trustee's and attorneys' fees without having received any benefit or a proper opt-out notice. *Waters v. City of Chicago*, 95 Ill. App.3d at 925. The state court plaintiffs and the City have revised the settlement so that no attorneys' or trustee's fees are assessed against holders of tort judgments which do not exceed $1,000. The Circuit Court of Cook County has approved the revised settlement.

1. Younger Abstention

Although this litigation in the federal courts partially overlapped the litigation initiated by Nebel in the state court, it did not fall within the appropriate bounds for *Younger* abstention. The vast majority of the cases which *Younger* has spawned have abstained from injecting the federal judiciary into a state initiated adjudication pending in a state forum. *See e.g., Samuels v. Mackell*, 401 U.S. 66 (1971) (request for declaratory relief against pending state prosecutions); *Moore v. Sims*, 442 U.S. 415 (1979) (requested injunction against state Department of Human Resources' suit to affect a parent-child relationship). The exceptional *Younger* progeny which did not involve pending state initiated proceedings abstained from considering relief which would operate directly against a state court. *See e.g., Juidice v. Vail*, 430 U.S. 327 (1977) (attempt to enjoin state justices from using an allegedly unconstitutional law to impose contempt sanctions); *Parker v. Turner*, 626 F.2d 1, 6-10 (6th Cir. 1980) (declaratory and injunctive relief to ensure that a state juvenile court followed due process); *Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981) (attempt to enjoin enforcement of a state court injunction). *See also Fair Assessment In Real Estate Association, Inc. v. McNary*, 50 U.S.L.W. 4017, 4020 (Dec. 1, 1981); *Etlin v. Robb*, 50 U.S.L.W. 3998.17 (June 28, 1982) (White, J., dissenting from denial of *certiorari*).

The state court settlement did not resolve nor completely obviate any of the constitutional challenges. The

failure of the state litigation to reach these questions did not result from any action of the federal judiciary.[11] None of the named plaintiffs in the federal litigation actively participated in the state litigation,[12] which was not instituted by the defendants. Nor was the goal of plaintiffs' suit federal relief which would operate directly against a state court. Under the circumstances *Younger* does not apply.

2. Burford Abstention

Burford abstention is appropriate only if federal review of a difficult question of state law would disrupt state efforts to establish a coherent policy respecting a matter whose importance transcends the result in the case under consideration. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976); *Ryan v. State Board of Elections*, 661 F.2d 1130, 1135 (7th Cir. 1981). But no doctrine requires abstention

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[11] On February 28, 1980, after the Circuit Court of Cook County entered the settlement order, the district court, after a hearing at which the trustee appointed by the state court appeared as a friend of the court, entered an order temporarily restraining the City from paying any tort judgment in excess of $1,000 and from deducting any attorneys' fees from any such judgment. On March 5, the district court dissolved the temporary restraining order. In considering the abstention question, we need not decide whether the district court acted properly in issuing the temporary restraining order, for the order did not ultimately deflect the state proceedings from their course.

[12] At oral argument counsel informed us that Evans opted out of the state class and that the Balarks did not. The state court denied a motion by Evans' attorney to exclude the *Evans* class from the *Nebel* settlement. The City did not base a *res judicata* defense upon the settlement, *see Allen v. McCurry*, 449 U.S. 90 (1980), or argue that the district court should have modified the federal classes to avoid any overlap with those defined by the state court. The state litigation did not seek and has not resulted in all the relief the federal plaintiffs seek. As of January 1982, the City had reduced its backlog but remained 26 months behind.

merely because resolution of a federal question may invalidate a state statute or overturn a state policy. *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5 (1978).

Colorado River Water Conservation District, 424 U.S. 800, indicates the limited scope of *Burford* abstention. In *Colorado River*, the United States sought a declaration of its federal and state law rights in certain Colorado rivers and streams. The Court recognized that probably "no problem of the Southwest section of the Nation is more critical than that of scarcity of water"; that Colorado had established an elaborate regulatory scheme for adjudication of water rights disputes; that the United States had utilized Colorado's scheme before, 424 U.S. at 804-806; and that a federal adjudication of water rights might conflict with the State's allocation of water rights, 424 U.S. at 815-16. Nevertheless, the Court held the State's interests did not justify *Burford* abstention. 424 U.S. at 815.

Neither does this case.

The defendants characterize the regulation and enforcement of state court judgments and the management of municipal budgets as matters of transcendent importance regarding which Illinois has established coherent policies which federal litigation threatens to disrupt. Without denigrating the seriousness of the interests cited, we note several factors which weigh against *Burford* abstention. (1) None of the statutes requires the City to adopt the practices in question, and Ill. Rev. Stat., ch. 24, § 8-1-16 applies only to the City of Chicago and not to any other Illinois municipal corporation. *See Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 747 (3d Cir. 1982), *cert. denied*, 50 U.S.L.W. 3934 (May 24, 1982). (2) The statutes in question are not especially complex nor do they form part of a complex scheme. *See Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982); *Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). (3) Illinois has not created a public agency or special system of judicial review nor otherwise indicated that the matter in question requires specialized expertise. *Knudsen Corp. v. Nevada State Dairy*

Commission, 676 F.2d at 377; *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F.Supp. 1118, 1125-26 (W.D. Pa. 1980). (4) The litigation involves the City's delay in paying federal as well as state court judgments.

We conclude that the issues in question do not fall within the area of a complex but coherent state policy. Therefore we approve the district court's refusal to abstain under *Burford*.

B. Deprivation of Property Within the Fourteenth Amendment

The defendants do not dispute that they committed the relevant conduct under color of state law. *See Monroe v. Pape*, 365 U.S. 167 (1961); *Parratt v. Taylor*, 451 U.S. 527, 535-36 (1981). They do dispute the other essential element of a § 1983 action: that the conduct deprived the plaintiffs of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See Parratt v. Taylor*, 451 U.S. at 535. They specifically dispute the trial court's conclusion that they have deprived the plaintiffs of property within the meaning of the Fourteenth Amendment.

The Constitution does not create property interests. But property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[,] . . . that secure certain benefits, and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Recent Supreme Court cases emphasize that the hallmark of property "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' . . . . Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247, 4250 (Feb. 24, 1982).

Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification. *Arnold & Murdock Co. v. Industrial Commission*, 314 Ill. 251, 255; 145 N.E. 342 (1924). *See Smolen v. Industrial Commissioner*, 324 Ill. 32, 34-35, 154 N.E. 441 (1926). Illinois law does not allow holders of judgments against municipal corporations to collect by execution against the property of the municipal corporation. *City of Chicago v. Hasley*, 25 Ill. 595 (1861); *Moore v. Town of Browning*, 373 Ill. 583, 588, 27 N.E.2d 533 (1940). Nevertheless, Illinois recognizes that a city has no higher duty than to pay the judgments against it and that it has no discretion to depart from statutory methods of payment. *People ex rel. Farwell v. Kelly*, 367 Ill. 616, 618-19, 12 N.E.2d 612 (1937). Furthermore, Illinois acknowledges that the money awarded in an eminent domain proceeding is the condemnee's property even during the pendency of the condemnee's appeal, when, pursuant to statute, the county treasurer withholds it. Thus, although no statutory provision authorizes the payment of interest on eminent domain awards deposited with the county treasurer, the condemnee must receive whatever income such an award earns if invested by the treasurer. *Morton Grove Park Dist. v. American National Bank*, 78 Ill.2d 353, 362, 399 N.E. 2d 1295 (1980).

Ill. Rev. Stat., ch. 85, § 9-102 empowers and directs a local public entity "to pay any tort judgment or settlement for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article."

In the event a local public entity does not pay a tort judgment during the fiscal year in which it becomes final, § 9-104 provides for two contingencies: one in which the governing body forms the opinion that the unpaid amount of the tort judgment is not too great to be paid out of the revenues for the ensuing fiscal year; the other in which the governing body forms the opinion that the unpaid amount is so great that undue hardship will arise if the entire amount is so paid. In the first contingency, § 9-104(a) directs the governing body to

pay the balance of the judgment during the ensuing fiscal year. In the second, § 9-104(b) directs the governing body to pay the balance, with interest, in not more than ten annual installments.

Section 9-105 authorizes the boards of local taxing entities to issue bonds for the payment of any and all outstanding tort judgments and removes such bonds from all statutory limitations upon the amount of such entities' debt.

Section 9-106 directs local public entities that derive revenue for maintenance and operations from rates and charges for services or facilities to provide funds in each fiscal year to pay all their tort judgments.

Section 9-107 authorizes local public entities annually to levy or have levied on their behalf taxes sufficient to pay the cost of judgments under § 9-102, to pay the costs of and principal and interest on bonds issued under § 9-105, and to pay tort judgments under § 9-104 to the extent necessary to discharge such obligations. Section 9-107 exempts taxes for tort judgments from limitations upon both the amount of taxes the entities may levy for general purposes and the percentage of the assessed valuation upon which taxes are required to be extended for the entities.

Ill. Rev. Stat., ch. 74, § 3 mandates that judgments shall draw interest from the date of the judgment.

Property is more than mere ownership. It includes the right to acquire, use, enjoy, and dispose of acquisitions subject only to the law of the land. *Morton Grove Park Dist. v. American National Bank*, 78 Ill.2d at 362. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917). Only one Illinois statute, ch. 85, § 9-104(b), authorizes delay in the payment of tort judgments beyond the end of the fiscal year following the year the judgment became final. That statute specifies a procedure which the City admits it has not invoked.

Upon review of the relevant statutes and decisions, we agree with the district court that under Illinois law, if the City has not invoked § 9-104(b) before the end of the

fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under Illinois law.

Delay beyond that time although only a temporary and nonfinal withholding of the plaintiffs' property is a "deprivation" within the meaning of the Fourteenth Amendment.[13] *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969). The contrast between current market interest rates and the statutory rate on a judgment emphasizes the impact of delay.

C. Due Process

The only possible justification for noncompliance with § 9-104(a) is a proposal, on account of undue hardship, to pay in ten installments under § 9-104(b). Since the City concedes it is not resorting to § 9-104(b), there is no

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[13] The property interest in immediate payment created by Illinois law distinguishes this case from *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 289 (1883). In *Louisiana ex rel. Folsom*, the judgment holder apparently only claimed a property interest in the judgments themselves and in the prior, less restrictive limitation upon the taxing power of New Orleans. At least those are the only asserted deprivations which the Court discussed. The Court did not indicate that Louisiana had established a right to immediate payment of the judgment in question.

If one reads *Louisiana ex rel. Folsom* as applying to state created property interests in immediate payment of judgments, it appears inconsistent with the application of the due process clause to temporary nonfinal deprivations in *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969).

Furthermore, the City directly deprived the plaintiffs of an unqualified right created by Illinois law whereas the 1879 Louisiana Constitution allowed other provisions for the satisfaction of judgments.

justification for failure to comply with § 9-104(a), and thus nothing to be determined at a hearing. Although a hearing can be an element of due process, takings without any justification are "governmental actions that even if undertaken with a full panoply of procedural protection, are in and of themselves, antithetical to fundamental notions of due process." *Parratt v. Taylor*, 451 U.S. at 545 (Blackmun, J., concurring).

In *Parratt v. Taylor*, 451 U.S. 527, the Court concluded that a prisoner suffered a deprivation of property within the meaning of the Fourteenth Amendment when a state employee negligently lost the prisoner's hobby kit. The Court, however, held that the State's tort claims procedure provided all the process due. The defendants maintain that under *Parratt* Illinois provides due process via a judicial procedure to which plaintiffs could resort to compel the City to comply with § 9-104(a).

This argument misses *Parratt's* point. In *Parratt*, the Court emphasized that it confronted "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 U.S. at 541. Therefore, the Court found it difficult "to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.* Here, in contrast, the City has systematically deprived the plaintiffs of their State created right to immediate payment. *Parratt* does not reach such conduct. *Logan v. Zimmerman Brush Co.*, 50 U.S. L.W. at 4251.

Logan supports Justice Blackmun's view that the *Parratt* opinion has a narrow reach and does not "suggest that the provision of 'postdeprivation remedies,' . . . within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property." *Parratt v. Taylor*, 451 U.S. at 545-46 (Blackmun, J., concurring).

Furthermore, the state remedies cited by the defendants[14] have never been used to obtain compensation for the City's use of judgment holder's property during the time the City withheld payment without statutory authorization. *See Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified in banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). We do not understand that *Parratt* remits the victims of a deliberate municipal policy to a speculative remedy. *See Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. at 4251.[15]

D. Ill. Rev. Stat., ch. 85, § 9-104(b)

The record discloses that the governing body of the City never determined that undue hardship would arise if the entire amount of unpaid judgments were paid out of revenues for the fiscal year following the fiscal year in which the judgments became final. Furthermore, the City never subjected the named plaintiffs or any class member to the installment plan method of payment per-

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[14] The defendants cite three state remedies: (a) a common law action for immediate payment of a tort judgment; (b) a writ of mandamus; and (c) wage garnishments against individuals also bound by the judgments against the City. The City does not characterize its seizure as an exercise of eminent domain. Even if eminent domain applies to what is essentially a seizure of cash and equal protection analysis tolerates the City's method of selecting those from whom it seizes property that is fungible with that possessed by a much larger class, just compensation would be due in an amount which could not be less than the judgments the district court ordered paid immediately.

[15] *Flower Cab Company v. Petitte*, No. 82-2208, August 4, 1982, is a decision of this court granting a stay of a mandatory injunction, pending appeal. *Flower Cab* considered it probable that under the principle of *Parratt*, the availability of mandamus by a state court to compel a ministerial act will fulfill the requirement of due process. The panel does not appear to have considered *Logan v. Zimmerman Brush Co.* in interpreting *Parratt*. In any event, the *Flower Cab* pronouncement was tentative, in the context of a stay pending appeal, and the fact situation presented there was distinctly different from that which is before us here.

mitted by Ill. Rev. Stat., ch. 85, § 9-104(b). Nor did the City ever tell the named plaintiffs or any class member that it would implement such a plan. Thus the plaintiffs had no standing to attack the constitutionality of that provision. *Blum v. Yaretsky*, 50 U.S.L.W. 4859, 4861 (June 25, 1982); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Because the district court improperly reached this issue, we vacate paragraph four of the district court's January 28, 1981 order, which declared Ill. Rev. Stat., ch. 85, § 9-104(b) unconstitutional and set forth the minimum procedural safeguards which due process requires before the City may decide to pay a judgment in installments over ten years. In vacating this portion of the court's order, we, of course, express no opinion about the constitutionality of the statute or the appropriateness of the order's procedural safeguards.

E. Equal Protection

In holding unconstitutional the City's practice[16] of paying tort judgments of $1,000 or less immediately while delaying payment of larger tort judgments for several years, the district court applied the equal protection analysis set forth in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Under

[16] Neither side disputes the trial court's view that the City's practice of giving priority to judgments of $1,000 or less did not originate in Ill. Rev. Stat., ch. 24, § 8-1-16. *Evans v. City of Chicago*, 522 F.Supp. at 801. That statute allows the City to levy a limited judgment tax in addition to the maximum of all other authorized taxes and exempts judgments of $1,000 or less from its requirement that judgments the City pays out of the separate fund received from that tax be paid in the order the judgments were obtained. But Ill. Rev. Stat., ch. 85, § 9-105 to § 9-107 removes payments of tort judgments from all statutory taxation and debt limitations. Therefore the more limited relaxation of the statutory limitations permitted by Ill. Rev. Stat., ch. 24, § 8-1-16, along with the accompanying requirements and exemptions no longer applies to the City's tort judgment payment practices.

that analysis, in economic matters a nonsuspect classification created by statute will survive a constitutional challenge if the classification relates to a legitimate state purpose. Both sides agree that this standard controls.

The defendants contend that the City's practice of paying tort judgments of $1,000 or less before tort judgments in excess of $1,000 related rationally to the City's attempt to reduce litigation and interest costs by encouraging quick settlements for $1,000 or less without interest in a large amount of nuisance litigation. The explanation does not survive examination for two reasons. First, the City's practice included immediate payment of fully litigated claims which resulted in judgments of $1,000 or less. Second, the practice did not reduce interest costs since interest accumulated on the sum of the unpaid judgments. The priority given smaller judgments did not reduce that total. Nor does the payment of many small judgments before an equal amount due on large judgments allow the City more effectively to manage its yearly appropriations and limit the City's debt. We discern no rational basis for the City's challenged classification.[17] *See Zobel v. Williams*, 50 U.S. L.W. 4613, 4614 (June 14, 1982). The district court correctly held the practice and Ill. Rev. Stat., ch. 24, § 8-1-16, insofar as the statute incorporates the practice, unconstitutional.

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[17] The plaintiffs allege that the pressure the City's practice puts on claimants to settle for $1,000 or less because of the time the City takes to pay larger judgments is the only way in which the practice can limit the City's debt. The city does not assert and we do not believe that a rational basis for the City's disparate treatment of the two classes of tort judgment holders may be found in the possibility that the city might exploit the willingness of those adversely affected by an arbitrary classification to sacrifice part of their claims in order to escape the undue delay the City imposes upon the class it disfavors.

V. Conclusion

For the foregoing reasons the district court's judgment, with the exception of paragraph four is AFFIRMED.[18] Paragraph four is VACATED.

The parties shall bear their own costs of appeal.

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[18] Section 9-104(a), in limiting the time within which a judgment must be paid, classifies judgments according to the fiscal year in which the judgment becomes final. Presumably finality is achieved when the time for appeal expires without an appeal, or when appellate proceedings have been completed.

The district court defined the *Evans* class in terms of the fiscal year in which a judgment was entered. Unless "entered" is taken to mean entry into the Comptroller's "Judgment Record" immediately upon becoming final, see note 3, it is likely that there are judgments entered in one fiscal year which do not become final until the following fiscal year, and where an appeal has been taken, the disparity may be greater. The parties have not made any issue over the possible difference between requiring payment at or before the end of the fiscal year following the fiscal year of entry of judgment and requiring payment at or before the end of the fiscal year following the fiscal year in which the judgment became final. Although we affirm the judgment, the district court is given leave to adjust it to be consistent with § 9-104 should the defendant seek that change.

Furthermore, the district court's judgment does not unambiguously incorporate the court's intent that the judgment act prospectively to require immediate payment to present members of the *Balark* class at the time they move into the *Evans* class. Should a party seek to clarify this aspect of the judgment, the district court may do so.

THOMAS, *Senior District Judge*, dissenting.

I respectfully dissent in part to the majority opinion. I feel that the question of the constitutionality of both 104(a) and (b) was squarely before the district court and there was error for the district court not to rule on both. Even though the district court did not certify his ruling under Rule 54(b), I think it should have been so certified and it is before this court. I would hold both 104(a) and (b) unconstitutional and concur in the rest of the majority opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 1993.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. WILLIAM C. LEE, District Judge*

SYLVIA EVANS and BERTHA BALARK, *et al.*,
Plaintiffs-Appellees,

No. 91-3277 v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 4119, 79 C 1939, 79 C 2493, John F. Grady, *Judge.*

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* The Honorable William C. Lee, United States District Judge for the Northern District of Indiana, was a member of the original panel but took no part in the vote on the suggestion for rehearing *en banc.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by the defendant-appellant on June 24, 1993 and the response thereto, a vote of the active members of the court was requested and a majority of the judges in active service voted to grant a rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on June 3, 1993 be, and are hereby, VACATED. This case will be reheard *en banc* at the convenience of the court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 24, 1993

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable WILLIAM J. BAUER, Circuit Judge
Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 91-3277

SYLVIA EVANS, Administrator of the Estate of ANDREW EVANS, Deceased, BERTHA BALARK, DANA BALARK, et al.,

Plaintiffs-Appellees

v.

CITY OF CHICAGO, a Municipal Corporation,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 77 C 4119, 79 C 1939, 79 C 2493, John F. Grady, Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

[Dated October 31, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SYLVIA EVANS, et al.,
Plaintiffs,
v. No. 77 C 4119
CITY OF CHICAGO, et al.,
Defendants.

BERTHA BALARK, et al.,
Plaintiffs,
v. No. 79 C 1939
CITY OF CHICAGO, et al.,
Defendants.

CURTIS CULLUM, et al.,
Plaintiffs,
v. No. 79 C 2493
CITY OF CHICAGO, et al.,
Defendants. Consolidated Cases

ORDER VACATING CONSENT DECREE

The court has under advisement the motion of the defendant City of Chicago to vacate the consent decree entered on May 31, 1984. That decree was negotiated by the parties and entered by the court following the decision of the Court of Appeals which, *inter alia*, affirmed this court's determination that the City's practice of paying tort judgments of $1,000.00 or less before tort judgments in excess of $1,000.00 was a violation of equal protection of the law. *Evans v. City of Chicago*, 689 F.2d

1286, 1299-1300 (7th Cir. 1982) ("Evans I"). On a second appeal following the trial on damages, another panel of the Court of Appeals reexamined the City's practice of prioritizing tort judgments under $1,000.00, found that there was a rational basis for it and concluded that no equal protection violation was involved. Accordingly, the panel overruled *Evans I*. *Evans v. City of Chicago*, 873 F.2d 1007, 1018 (7th Cir. 1989) ("Evans II").

Defendant's motion to vacate is made pursuant to Rule 60(b)(5) which provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * * * *
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . .

Defendant argues that it comes within both provisions of Rule 60(b)(5): the prior judgment upon which the consent decree is based has been overruled, and, secondly, because the prior judgment was overruled, it is no longer equitable that the consent judgment should have prospective application.

Plaintiffs oppose the motion to vacate, arguing that the City was motivated to consent to the decree not only because of the equal protection holding of *Evans I* but also because of the holding of Evans I that the City's failure to pay judgments no later than the fiscal year following their entry, pursuant to Ill. Rev. Stat. ch. 85 § 9-104(a) was a deprivation of property without due process of law. *Evans I* at 1296-1299. While this may be true, it appears

that the due process holding of *Evans I* has not survived *Evans II*. *See Evans II* at 1018 n.15, stating that because this court did not base its decision in the damage trial on due process grounds, and neither party raised the question of due process in the *Evans II* appeal, "the due process claim has not survived to this stage of the litigation."[1] Thus, it appears that all legal underpinning for the consent decree has been eliminated by *Evans II*. We agree with defendant that this case falls squarely within the language of Rule 60(b)(5), in that the consent decree was based on a judgment (*Evans I*) that has now been overruled. This court is quite familiar with the long history of this litigation and participated in a number of conferences with the parties during the process which resulted in the drafting of a mutually acceptable decree. There is no doubt in the court's mind that the City would never have consented to the decree had it not felt constrained to do so by the decision of the Court of Appeals in *Evans I*.

In these circumstances, the court finds that it would be inequitable to deny the City's motion for relief from the consent decree. Accordingly, the motion is allowed, and the consent decree of May 31, 1984, is hereby vacated.

DATED: October 31, 1990

ENTER: /s/ JOHN F. GRADY
United States District Judge

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[1] By a separate order entered this date, we deny plaintifffs' motion to address their due process challenge to ch. 85 § 9-104(a).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 77 C 04119, 79 C 1939, 79 C 2493

Date: October 31, 1990

Name of Assigned Judge: John F. Grady

Case Title: Evans v. Bilandic

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☑ Other docket entry:

ENTER ORDER VACATING CONSENT DECREE. The motion of the City of Chicago to vacate the consent decree entered on May 31, 1984, is allowed, and the consent decree of May 31, 1984, is hereby vacated.

* * * * *

(12) ☑ [For further detail see order attached to the original minute order form.]

* * * * *

[Dated July 25, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SYLVIA EVANS, et al.,
Plaintiffs,
v. No. 77 C 4119
CITY OF CHICAGO, et al.,
Defendants.

BERTHA BALARK, et al.,
Plaintiffs,
v. No. 79 C 1939
CITY OF CHICAGO, et al.,
Defendants.

CURTIS CULLUM, et al.,
Plaintiffs,
v. No. 79 C 2493
CITY OF CHICAGO, et al.,
Defendants. Consolidated Cases

ORDER

The court having fully considered the motion of plaintiffs to vacate certain orders entered on October 31, 1990,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Plaintiffs' motion to reconsider the order of October 31, 1990, vacating the consent decree of May 31, 1984, is allowed in part and denied in part. The decree will be modified to eliminate any prohibition against paying judg-

ments under $1,000.00 ahead of judgments in excess of $1,000.00. In all other respects, the order of October 31, 1990, is vacated and the consent decree of May 31, 1984, is reinstated. The parties are requested to submit an appropriate order modifying the decree in regard to judgments over and under $1,000.00, and hearing on the proposed language of the modification is set for August 2, 1991, at 10:00 a.m.

(2) The order of October 31, 1990, denying plaintiffs' petitions for attorneys fees is vacated. Local General Rule 46, requiring that fee petitions be filed within 90 days of entry of final judgment, shall not apply to this case, and counsel need not petition for fees covering work performed since their last fee petitions until this court sets a specific date for the filing of such petitions.

(3) Defendant's motion for return of the $60,000.00 interim fee payment to Edward Stein is denied.

(4) Plaintiffs' motion to reconsider the order of October 31, 1990, denying their motion for ruling on the constitutionality of Ill. Rev. Stat. ch. 85 § 9-104(a) is denied.

DATED: July 25, 1991

ENTER: /s/ JOHN F. GRADY
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 77 C 4119* Date: September 4, 1991

Name of Assigned Judge: John F. Grady

Case Title: Sylvia Evans, et al. vs.
City of Chicago, et al.

MOTION:

A) DEFENDANT
B) MOTION TO RECONSIDER THIS COURT'S JULY 25, 1991 ORDER

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] *(This order concerns related cases 79 C 1939 and 79 C 2493)

The motion of defendant City of Chicago for reconsideration of the order of July 25, 1991, denying its motion to vacate the consent decree is denied. The defendant's alternative motion to set a termination date for the consent decree is also denied.

* * * * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Chicago, Illinois — October 22, 1987 — 3:45 p.m.

SYLVIA EVANS, et al.,
Plaintiffs,
v. No. 77 C 4119
CITY OF CHICAGO, et al.,
Defendants.

BERTHA BALARK, et al.,
Plaintiffs,
v. No. 79 C 1939
CITY OF CHICAGO, et al.,
Defendants.

CURTIS COLLUM, et al.,
Plaintiffs,
v. No. 79 C 2493
CITY OF CHICAGO, et al.,
Defendants.

VOLUME VIII-A
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

APPEARANCES:

For the Plaintiffs:

SINGER & STEIN
53 West Jackson Boulevard
Suite 1315
Chicago, IL 60604, by
MR. EDWARD T. STEIN
MR. CLIFFORD ZIMMERMAN

[2] MR. JOHN B. CASHION
33 North LaSalle Street, 25th Floor
Chicago, IL 60602

For the Defendants:

CITY OF CHICAGO
121 North LaSalle Street, Room 610
Chicago, IL 60602, by
MR. DODGE WELLS
MR. LOCKE E. BOWMAN, III
MR. MATTHEW J. PIERS

Also Present:

MS. KAREN C. LIEBERMAN

COURT REPORTER:

LAURA M. BRENNAN
219 South Dearborn Street, Room 2524A
Chicago, IL 60604
(312) 427-4393

[3] (The following proceedings were had in open court:)

THE CLERK: 77 C 4119 and related cases, Evans v. City of Chicago, for decision.

THE COURT: Good afternoon, counsel.

MR. STEIN: Good afternoon, your Honor; Edward Stein for the Collum plaintiffs and co-counsel with Mr. John B. Cashion in the Evans/Balark case.

MR. WELLS: Dodge Wells and Locke Bowman for defendants.

THE COURT: Good afternoon.

MR. BOWMAN: Good afternoon.

MR. STEIN: Your Honor, if I may start out by asking the Court something, after Mr. Picur testified that there was a water fund, an enterprise fund called the water fund and that those—there were tort judgments that were entered and perhaps attributable to the water fund, and, therefore, the water fund would take care of those things, that was really the first time I had heard that analysis.

I went back to my office after Court, and I looked through some printouts that I had from the previous time that we got the names of the plaintiffs and produced notices of them. I found some cases that had the notation "water" on those cases. Now, they were older cases, '71, '72, and so forth.

I sent my paralegal over to the Circuit Court of Cook [4] County and asked her to order the files because I knew they were in storage, which she did. Yesterday afternoon she went and got certified copies of the judgment orders in the cases that I had given her with copies of the complaints.

Now, those cases were on the tort judgment list that we were provided, and I matched them with the data base that Mr. Bowman had given us, and I found the controller numbers. Those cases were at least, presumptively by me, paid out of the tort judgment fund, which to me is some evidence of paying some judgments differently than others, paying water fund judgments out of the tort judgment fund, for instance.

Now, I have sent copies of this data to Mr. Bowman this morning, and he called me this afternoon saying that he would not stipulate and would not agree to a motion

by me to open the evidence just to submit these documents.

He also indicated to me that in at least one of the cases that the books that he looked at, at least to him, indicated that these judgments, although entered in a tort judgment ledger, may very well have been paid out of the water fund.

I don't know that for a fact, but I am seeking leave to file Plaintiffs' Exhibits 19 through 24 which comprise what I have just talked about.

THE COURT: Mr. Wells.

MR. WELLS: Your Honor, we object. The question of [5] whether these were or were not paid out of the tort judgment fund is not satisfied by all three of the judgments themselves. In fact, the Defendants' Exhibit Number 1, which are the ledger books, does show that each of these judgments were, in fact, paid out of the water fund.

THE COURT: What makes you think they were paid out of the tort judgment fund, Mr. Stein?

MR. STEIN: They were listed on the data base that we received from the defendants.

THE COURT: Which was a list of judgments paid out of the—

MR. STEIN: Tort judgment fund, we believe.

THE COURT: How was that list compiled?

MR. BOWMAN: The list was compiled, your Honor, from the tort or judgment record ledger books, which are Exhibit 1, a big stack of them.

Mr. Stein sent me a list of 15 or so judgments that he wants to bring into issue at the 13th hour. I went back and looked at the judgment ledgers themselves. In each and every one of the instances that he brings up, there is on the ledger a notation "water" next to the judgment in question.

Moreover, on a monthly basis, the ledgers were summarized. There was a list of tort 395 judgments and a separate list at the conclusion of each month of charges to be made to the water fund from judgments that were paid in the [6] month in question.

For example, in March of 1973, there is a list of some 13 or so $200 judgments which were, in fact, paid in March of 1973, and charged to the water fund for that month was $3,600. It is perfectly apparent from the ledgers themselves that these were water judgments for one reason or another recorded in this ledger book and paid from the water judgment fund. Well, there is no—paid from the water fund.

THE COURT: What does the ledger book purport to be, only judgments paid from the tort judgment fund or just all judgments paid in tort suits regardless of what fund may have been used to pay it?

MR. BOWMAN: Well, I don't know that it is either. It is a listing of—it is a judgment record. It is a listing of judgments, principally tort judgments, and it was the basis for the data base in this case.

All of the class members have their judgments listed in this judgment ledger.

THE COURT: Mr. Stein, unless that ledger book purports to be a listing only of judgments paid out of the judgment fund, then it does not seem to me that your documents prove anything. Would you agree with that?

MR. STEIN: Well, I would agree with that. This is the first I heard that it didn't.

THE COURT: I will receive your documents over [7] objection, and then you can each argue what you want to from them, but I will tell you right now, I don't infer any payment of water judgments out of the tort judgment fund on the basis of these documents, but they are

certified copies of judgments. I mean, there is no question as to their authenticity. I will receive them.

MR. BOWMAN: Your Honor, could we have leave to obtain an affidavit from Mr. J. Nelson Duncan, custodian of these records, simply reciting his customary practice with respect to the recording of judgments—

THE COURT: Yes.

MR. BOWMAN: —and put that in the—

THE COURT: Well, actually, yes. Somebody who could tell us what that list of judgments is and what is included and what isn't included would certainly answer the question that remains open.

MR. BOWMAN: So we can supplement the record?

THE COURT: You may.

All right, if there is nothing else, I am going to give you my decision. Is there anything else you want to do before I do that?

MR. CASHION: No.

THE COURT: All right, you can have a seat.

I will give you my findings of fact and conclusions of law. First I will tell you what the findings of the Court are [8] with regard to the customary and routine practices of the City of Chicago from 1972 until some time in the early '80's, that is to say, the period of time involved in this lawsuit. I will concentrate on those practices as they pertain to judgments over $1,000.

First, the City did not pay such judgments within the year the judgment was entered. Secondly, the City did not pay such judgments in the ensuing year. Thirdly, the City did not pay those judgments in 10 annual installments. Fourthly, the City did not pay such judgments in accordance with any state statute. Fifth, the City did not pay those judgments in accordance with its own ordinance, Ordinance 7-29, which required that they be paid in order of entry. And sixth, the City made no attempt to budget

enough money to pay judgments over $1,000 in accordance with the time limits established by statute or its own ordinance.

In short, with respect to judgments over $1,000, it was the custom and practice of the City simply to ignore the requirements of law with regard to when those judgments should have been paid.

I will now discuss those practices of the City in light of the arguments that the parties have made in regard to the question of due process under the Fourteenth Amendment and Section 1983. Any sensible concept of due process implies substantial adherence to whatever law is applicable to the [8] situation. Clearly, that is the process that is due.

The intentional and consistent failure of the City to comply with the time requirements of the applicable statutes and its own ordinance seem to me to have constituted a violation of due process owing to the members of the plaintiff classes.

We have had colloquy here the last few days on the distinction between procedural and substantive due process. It seems to me that the practices of the City may well be or have been, because we are speaking in the past tense here, a violation of both procedural and substantive due process. The argument for a violation of procedural due process is that the City followed no process at all. There simply was no procedure other than a consistent and intentional disregard of the procedure that was clearly established by law. The reason, it seems to me, that the practice of the City may have been a substantive due process violation is that there was no rational justification for the City's disregard of the statutes which should have governed its behavior.

In Griffin High School v. Illinois High School Association, 822 Fed. 2d 671, decided by the Seventh Circuit in 1987, the Court said at page 676:

". . . to survive substantive due process analysis, a regulation need only 'bear a rational relation to a legitimate government interest.' "

[10] If the survival of a substantive due process analysis requires a legitimate relationship or a rational relationship to a legitimate governmental interest, it seems to me that that relationship is lacking here. I will discuss that in connection with my later remarks concerning equal protection. The analysis of rational relationships seems to me to be the same in both substantive due process and equal protection analysis.

It seems to me, therefore, that the practice of the City probably violated the due process rights of the plaintiffs. I emphasize that I am talking about the practice of the City because I need not reach even by way of discussion the question of whether the procedure specified in Section 9-104(a) comports with due process. The reason I need not reach that question is that the City never made any effort whatever to comply with that statute. It simply isn't involved in this case. The City relies upon the statute in another connection but not in the sense that it paid the plaintiffs in the manner required by either 9-104(a) or, failing that, 9-104(b).

Whether a due process violation occurred is only the first question that one would be required to answer in a due process analysis. The second question would be whether the conduct of the City which violated due process constituted a deprivation of the plaintiffs' property. [11] The parties disagree as to whether plaintiffs' judgments constituted property from the date of their entry. Plaintiffs say that the judgments were property, and de-

fendants contend that whatever the status of the judgments at the time of their entry, there was no property right in payment of the judgments until the end of the ensuing fiscal year, by virtue of Section 9-104(a).

Support for each of these views can be found in the law of this case or the law cited in this case in the decision of the Seventh Circuit, Evans v. City of Chicago, 689 Fed. 2d 1286. At page 1296, the Court said:

"Under Illinois law, a judgment becomes a vested right of property once it is no longer subject to review or modification."

The Court cited several Illinois cases for that proposition.

Later in the opinion at page 1297 the Court stated:

"Upon review of the relevant statutes and decisions, we agree with the District Court that under Illinois law, if the City has not invoked 9-104(b) before the end of the fiscal year following the year in which the tort judgment became final, the tort judgment holder may legitimately claim entitlement to immediate payment. Thus, at least in that situation, the right to immediate payment of a tort judgment against a municipal corporation becomes a property right under [12] Illinois law."

Now, the defendant cites that language as a holding by the Court of Appeals that there was no property right in these judgments that plaintiffs could have been deprived of by defendants' conduct prior to the time specified in Section 9-104(a).

I do not regard that language as constituting such a holding, because the Court specifically said that the right to payment became property "at least in that situation." The Court would have had no occasion to add the words, "at least in that situation," if it had intended to foreclose the possibility that a constitutional right to payment or a

property right in payment may have existed at some prior time. I do not regard the issue of the constitutionality of Section 9-104(a) as having been decided yet in this case either by me or by the Court of Appeals.

If I had to reach the question, I would hold that in the circumstances of this case, Section 9-104(a) did not define the property right of the plaintiffs, simply because the City never made payment within the time specified in that statute. I realize there are two sides to that question, but I have great difficulty with the City's argument that it can ignore a statute, deliberately fail to comply with its requirements, and then say that that very statute defines the other party's rights.

[13] Now, clearly, there was a due process violation of the plaintiffs' rights to the extent that they were not paid at the end of the ensuing fiscal year. I do not understand the City to contend otherwise. So we do reach the due process question in that limited sense, and I think the Court of Appeals' quotation that I just read clearly indicates the view of that Court that a due process violation occurred the moment the City failed to pay at the end of the ensuing fiscal year.

That, however, is not the primary due process question that is presented by this case; rather, the very difficult question that is presented, or would be presented, is whether failure to pay within the time limited by Section—let me start over—whether failure to pay within whatever time the Court determines is a reasonable time would constitute a due process violation even though payment were made within the time limited by Section 9-104(a).

As plaintiffs have suggested during the trial, it is possible to decide this case without deciding the facial constitutionality of Section 9-104(a). I agree with the plaintiffs that it is possible to decide the case on the basis of equal protection. The Court of Appeals has already held that there

is an equal protection violation in one respect, and what remains for this Court to decide is whether there are also other grounds for finding an equal protection violation.

Because another ground, namely, the equal protection [14] ground, does exist, it seems to me that I should not reach the question of whether Section 9-104(a) is facially constitutional, and that, I take it, is especially true in light of my inclination to hold the statute unconstitutional should I reach the question. As Justice Rehnquist said in his opinion in the case of Jean v. Nelson, 474 US 846 at 854, quoting from the earlier case of Spector Motor Company v. McLaughlin.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable."

Now, as is true with so many pronouncements of law, the applicability of that doctrine to the facts of this case is not altogether clear to me. We are already reaching one constitutional question, namely, that of equal protection, and we are going to decide it. The only basis for deciding the case is a constitutional one, because that is the basis of the Court's jurisdiction, and the question really is whether, if you can decide the case on one constitutional basis, should you stop short of reaching a second and alternate constitutional basis.

In short, what we have here is not a case where we can avoid constitutional questions altogether, but one where we have to decide at least one no matter what we do. In those [15] circumstances, does the doctrine of avoiding constitutional questions apply? I believe it does, but the matter is not altogether free from doubt in my mind.

That doubt notwithstanding, however, I do not reach the question of whether the City's practice of paying judgments at times beyond 60 days after their entry and up

to the end of the ensuing fiscal year violates due process, nor do I reach the question of whether Section 9-104(a) is facially violative of either due process or of equal protection (because plaintiffs also suggest that to the extent that Section 9-104(a) classifies tort judgments in a manner different than other kinds of judgments, it violates equal protection.) I do not reach those questions.

I turn now to the matter of equal protection. In one of the citations furnished yesterday by the City, Minton v. St. Bernard Parish School Board, 803 Fed. 2d 129, a Fifth Circuit case decided in 1986, the Court stated at page 132:

"The constitutional right to equal protection, however, is not predicated upon the existence of a property right. Due process safeguards only against the deprivation of life, liberty or property, but every person is entitled to equal protection, even with regard to interests that do not constitute life, liberty or property in the constitutional sense."

So, in short, the equal protection analysis is [16] entirely independent of the question of whether plaintiffs had any property right to have payment of their judgments prior to the end of the ensuing fiscal year.

The evidence revealed the following in regard to the City's practices in paying judgments. During the times in question in this suit, and all of these factual determinations have to do with that period of time, the City paid judgments of $1,000 and under within 30 days customarily, within 30 days of their entry. According to the stipulation that was entered into yesterday, the majority of non-tort judgments were paid within 30 to 150 days after demand for payment was made. The evidence showed that contract judgments were ordinarily paid from line item accounts in the general corporate fund that had to do with the particular department that had made the contract and

sometimes even with the particular activity concerning which the contract had been entered into.

The evidence further showed that if there was not money available within the budget for that particular line item, it would be found elsewhere in the general corporate fund, and contract judgments would be paid from those moneys within the 30- to 150-day time period just mentioned.

The evidence further showed that as to judgments entered against departments or agencies of the City that were considered to be enterprise departments or agencies, the judgments would be paid out of the funds appropriated or [17] collected by that department or agency. The primary example was that water judgments, judgments against the water department, were paid out of the funds of the water department.

The evidence further showed that in cases involving judgments obtained by employees of various City departments and agencies such as Shakman judgments or other kinds of employment discrimination judgments, the usual source of payment for those judgments was the budget of that particular department. Those judgments were not paid out of the tort judgment funds that were used to pay the other kinds of tort judgments.

Now, all of these practices resulted in these other kinds of judgment creditors receiving payment at a substantially earlier time than the judgment creditors who are members of the plaintiff classes. As I indicated, the difference could have been as long as that between 30 days for the under $1,000 judgment creditor and up to five years or more for the holder of a tort judgment in an amount exceeding $1,000.

The City sought at an earlier time to justify the preference given to holders of judgments under $1,000, and the justifications tendered were rejected both by me and by the Court of Appeals. As I have previously indicated, I

think that is the law of this case. The defendant has offered an additional justification during the course of the trial, and I will comment upon that in a moment.

[18] The question in regard to all of these practices is whether there is a rational justification for the different treatment of these judgment creditors vis a vis the judgment creditors who are members of the plaintiff classes. The question is not whether there is a rational basis for how the City handled these other kinds of payments. My impression of the City's presentation was that it believed, or at least was attempting to cause me to believe, that the only question is whether a sensible reason can be given for, for instance, paying Shakman judgments out of the budget of the Department of Streets and Sanitation if the plaintiff employee happened to be discriminated against by that department. That is not the question before me.

The question is whether there is a rational basis for the distinction drawn by the defendant between the plaintiff class and these other judgment creditors. If the same kind of rationale could be applied to payment of the judgments of the plaintiff classes as was applied to the earlier payment or preference given to these other judgment creditors, then, clearly, no rational basis has been offered for the distinction the defendant made between these different classes of judgment creditors.

I would like to turn now, therefore, to a discussion of the reasons offered by the defendant for the preferential treatment given the other judgment creditors. Now, I should [19] say in fairness the City did not attempt to justify preferential treatment. They attempted to justify different treatment. They do not regard it as preferential. But the effect of paying judgments out of these other funds for other creditors was to accelerate their payments

substantially in regard or in relation to the times at which members of the plaintiff classes were paid.

I will not rehash the reasons given initially by the defendant to justify the different treatment of judgment holders of $1,000 or less. The additional justification given at the trial is that this was a good way to satisfy more people. There were more $1,000 and under judgments than there were anything else, and if you gave them preference, you satisfied more people. Now, that is good politics, I suppose, although I doubt that $1,000 and under judgment creditors would determine the balance at the polls in any election. But it does not seem to me to be a good constitutional law.

If the effect of a practice is to discriminate against a class of persons, it is no answer to say that by doing that you contribute to the happiness of the larger class of persons who are not being discriminated against. If that kind of analysis were a valid equal protection argument, then I suppose that all of the Jim Crow laws that existed in the South in days gone by could have been justified on the basis that they were really making more people happy than they were making unhappy, [20] or at least more voters happy than they were making unhappy.

In short, I do not think that the happiness principle or satisfaction principle advanced by the City during the course of the trial is any more valid than the justifications advanced for the $1,000 and under practice at an earlier time. I find again, therefore, that the City's practice of paying judgments of $1,000 and under at a substantially earlier time than it paid judgments obtained by class members constituted a violation of the right of the class members to equal protection of the laws.

The justification offered by the City for preferential payment of contract judgments and judgments entered against enterprise entities is that it makes good accounting sense.

This, according to the City, is the practice of fund accounting. It makes sense, says the City, to put the burden of a judgment on the entity which should be generating the revenue to pay that judgment. I have no argument with that principle, nor do the plaintiffs. It seems to make good sense. That, however, is not the question.

The question is whether that justification is sufficient to explain a different treatment of judgments entered against the City on the basis of the conduct of other departments, such as the Police Department, Streets and Sanitation, whatever might be involved.

The testimony here, for instance, was that over 50 [21] percent of the judgments entered against the City are for sidewalk fall-downs. Would it make sense from a fund accounting standpoint to say that the department in charge of maintaining the streets and sidewalks should be chargeable with payment of judgments arising out of negligence in connection with that duty? Would it make sense to say that the appropriation of the Police Department should be charged with the judgments that have to be paid because of misconduct of Police Department members?

The witnesses who testified in favor of the fund accounting approach gave no explanation as to why the fund accounting principle would not be equally applicable to those situations. Mr. Picur offered the statement, indeed, that such an approach would make good sense "internally" but would not be good from an "external" standpoint. Apparently I was supposed to guess what was meant by that. I can't. He did not give me enough clues. I see nothing in the evidence that supplies a rational justification for paying water judgments out of the water budget but not paying Police Department judgments out of the appropriation for the Police Department.

Now, turning to the other kinds of tort judgments, such as the employment discrimination judgments and the Shak-

man political activity judgments, the explanation offered by the City witnesses was the enterprise principle or fund principle carried one step further. As Mrs. Gilliam indicated, the [22] principal reason, or a principal reason, for paying Shakman judgments out of the department budget that happens to be involved is to punish that department for having caused the City to incur that liability. The theory, as is the theory, I suppose, of all punitive measures, is that by doing that, you can deter that kind of misconduct and save money in the long run.

I asked Mrs. Gilliam, in fact, whether her impression was that it was doing any good, and, as I expected, she was unable to furnish any statistical evidence that it was, but I got the impression that she thought that in the long run it was going to have a salutary effect. And I would be surprised if it did not because, as she pointed out, if the funds of the agency are needed for that purpose, they are not replenished from some other source. The agency simply has to eat that liability, and if that means cutting back on personnel or cutting back on something else that they might want to have, so be it.

That is, it seems to me, a very wise governmental policy, at least in theory. How it works in practice, I certainly don't know, but I see no reason it should not work in practice. But another thing I cannot see is why it would not work equally well in practice with the Police Department. If you want to punish people for governmental misconduct, why not punish police officers who brutalize citizens and thereby in [23] incur financial liability for the City. No rational basis for differentiation between a Shakman judgment and a police misconduct judgment was offered by the City.

To call it "fund accounting" is simply to describe what the City is doing; it is not to justify or explain what the City is doing in any way that would persuade the Court

of a justification for the different treatment. The Court has to cut through labels, cut through phrases like "fund accounting" and get down to the facts of the case. The facts of the case, it is clear to me, are that there is no principled way in which one can arrive at the conclusion that a rational distinction can be made between the tort judgments owned by the plaintiffs in this case and other judgments to which the City gave preference on the various theories I have just discussed.

The defendants argue that in order to establish that the prioritization policies of the City denied the plaintiffs equal protection of the laws, the plaintiffs must establish that absent that prioritization, there would have been enough money to pay the plaintiffs in a timely manner or at least in the same manner as all other judgment creditors were paid.

In short, the City says that if there was not enough money to pay everybody, then it is impossible for the plaintiffs to show that they were really hurt by the prioritization policy. And in any event, says the City, it is incumbent upon each plaintiff to demonstrate that but for the [24] preferential payments made to other judgment creditors, his or her judgment would have been paid at some specific earlier date. Now, of course, the evidence does not meet that kind of standard, and if defendant is correct, the plaintiffs have not established a case of damages based upon equal protection violations.

I believe, however, that the City's argument is invalid. What the Constitution requires is that the City treat similarly situated people alike. The City paid various kinds of judgment creditors in a timely manner. It had enough money to do that. It also had the capability to raise enough money to treat everyone alike. It chose not to do so, and this brings us to the matter of chronic under-

budgeting which has been mentioned so frequently during this trial.

As I indicated at the outset of my remarks, it was the policy of the City to underbudget, to fail to levy and collect sufficient taxes to pay judgment creditors within a reasonable time. It is my view of the requirements of equal protection, and it is the only view that would make any sense to me, that if the City chooses to use tax money to pay some judgment creditors within 30 days, it must raise enough tax money to pay all similarly situated judgment creditors within the same time.

If that were not the law, then the City is really in a position to decide for itself if and when it can be regarded as having violated equal protection of the law. It can [25] arbitrarily select a favored group, pay that favored group or render whatever kind of valuable service to that favored group it chooses to render and then deny similar treatment to other persons on the ground that the money is gone, it has no more money. That kind of argument simply cannot pass muster if the concept of equal protection is to have any substance.

I hold, therefore, that the City's intentional, chronic underbudgeting is part of the equal protection violation in that it prevented the City from having on hand enough money to pay all judgment creditors who were similarly situated in the same manner. The City can't have it both ways. It can't deliberately underbudget and yet make timely payment to certain selected creditors. If it chooses to underbudget, then it has to treat all creditors alike. They all have to share the misery.

The plaintiffs have argued that there was another category of judgment creditors who were given preferential treatment. I have named four: The thousand dollars and under, the contract creditors, the enterprise creditors and

the assorted special tort creditors such as the Shakman or employment discrimination creditors.

Plaintiffs seem to argue that there was a fifth group, and they were simply judgment creditors who were paid out of order according to some unknown and unspecified preferential policy of the City.

[26] The evidence is insufficient to satisfy me that any custom or practice sufficient to satisfy the Monell Doctrine existed in that regard. There has been some evidence of some payments that were made obviously out of order, but in some of those instances there were explanations offered that might be sufficient, such as the evidence that there had been surety bonds posted in connection with some appeals that were taken from some judgments.

In short, we just do not have enough evidence here for me to conclude that there was any separate category of people we just might call favorite sons and daughters who were given preferential treatment, and I think that there has been no equal protection violation on that particular theory.

Just to make clear what my holding is on the liability portion of the equal protection analysis, I find that there has been an equal protection violation by the unjustified preferential payments made to judgment creditors of $1,000 and under, contract judgment creditors, enterprise judgment creditors, and assorted tort judgment creditors such as Shakman claimants.

I turn now to the question of damages. The liability question has not been altogether without difficulty. The damage question is even less so. The Evans and Balark classes have stipulated with the City as to what their damages should be either on an approach based on the ensuing fiscal year or [27] based on some time earlier than

that. Because the equal protection analysis has nothing to do with a property right, I adopt the stipulation of the parties that the appropriate time at which judgments should have been paid was the 61st day after entry of judgment, and damages for the Evans/Balark class should be calculated pursuant to the stipulation of the parties on that basis.

A question may exist as to whether the preferential payments which constitute the equal protection violations were still being made after the last of the Evans plaintiffs was paid his judgment. That would have to do with the question of how long the damage period lasts. Plaintiffs have made what seems to me to be a valid argument in that regard; namely, that even after the City stopped making the preferential payments, the effects of the previously unconstitutional policy were still being felt in the backlog of unpaid judgments that had built up due to that practice. That backlog persisted long enough to cover the entire damage period for all of the plaintiffs in this case.

I turn now to the specific problems presented by the Collum class.

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Nos. 93-1372 and 93-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
APR 25 1994
OFFICE OF THE CLERK

SYLVIA EVANS, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

BERTHA BALARK, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court should continue to enforce a consent decree controlling the budget of a unit of local government where a change in law since entry of the consent decree makes plain that there is no substantial claim that the decree serves any federal interest.

2. Whether the court of appeals erred by determining that its own prior decision in this case, repudiating a still earlier decision of the same court, had so changed the law that continued enforcement of a consent decree based on the repudiated decision was inequitable or an improper exercise of federal power.

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IN THE

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v.

CITY OF CHICAGO,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting en banc, Pet. App. 1-23, is reported at 10 F.3d 474. The opinion of the three-judge panel of that court, vacated by the order granting respondent's suggestion for rehearing en banc, Pet. App. 24-50, is reported at 995 F.2d 1393. Prior opinions of the court of appeals in this litigation are reported at 689 F.2d 1286 (7th Cir. 1982), and 873 F.2d 1007 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990).

STATEMENT

This is the second time petitioners have sought certiorari in this litigation, which is now about seventeen years old. The named petitioners are class representatives of two of three consolidated class action lawsuits filed between 1977 and 1979 against the City of Chicago. All three complaints alleged that the City's practice of paying small tort judgments before large ones regardless of the dates on which the judgments were entered, and the City's practice of delaying payment of large tort judgments (although all judgments, when paid, included statutory post-judgment interest) violated the Due Process and Equal Protection Clauses. When certified, the *Evans* and *Balark* classes differentiated on the basis of how old the unpaid judgment was; the reason for any such distinction has long since disappeared. The third class was not involved in the proceedings at issue in these petitions.

On January 28, 1981, the district court entered partial summary judgment in favor of the *Evans* and *Balark* plaintiff classes and against the defendant City of Chicago. The court directed the City to pay all members of the *Evans* class immediately; declared unconstitutional two Illinois statutes governing payment of judgments against municipalities; and certified the order for immediate appeal under Fed. R. Civ. P. 54(b).

The court of appeals affirmed on the basis that the Equal Protection Clause forbade the City to distinguish between large and small tort judgments in setting a payment schedule. See *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (*Evans I*). The court held that plaintiffs had a protectable property interest in prompt payment (*id.* at 1296), but nonetheless vacated the district court's order on the constitutionality of the state statute, holding that no one had standing to challenge the statute because the City had never chosen to pay anyone under it. *Id.* at 1299. The case returned to the district court for further proceedings.

The parties, with the district court's assistance, entered into negotiations, and on May 30, 1984, the district court approved a consent decree. Pet. App. 93-107. The consent decree recited the course of the litigation and bound the City to pay all judgments in the order in which they were entered and to pay all judgments within 45 days. The consent decree did not settle the question what damages were due for the City's past practices.

Trial proceeded in the district court on the outstanding damages issue. At this stage, petitioners introduced a new theory of equal protection liability. They argued that the City irrationally chose to delay payment of tort judgments while paying other types of judgments (such as contract claims) immediately. See *Evans v. City of Chicago*, 873 F.2d 1007, 1012-13 (7th Cir. 1989) (*Evans II*), cert. denied, 495 U.S. 956 (1990). Petitioners also reasserted their due process argument. The district court held for petitioners on the new equal protection claim and did not address the due process claim.

This time, the court of appeals reversed and overruled the decision in *Evans I*, holding instead that the Equal Protection Clause did not forbid the City from treating tort judgments differently from other judgments, nor from paying judgments slowly. See *Evans II*, 873 F.2d at 1016-18. The court concluded that there was a rational basis for the City to pay small judgments out of order, namely, reducing delays for large numbers of small judgment creditors. *Id.* at 1016. Because petitioners had not pressed their due process claim as an alternate ground for affirmance in *Evans II*, the court of appeals indicated that "[t]he due process claim ha[d] not survived to this stage of the litigation." *Id.* at 1018 n.15; see *id.* at 1012 n.11.

The case returned to the district court, where petitioners' motions for attorneys' fees were pending. Petitioners argued that, despite their defeat in *Evans II*, they were still prevailing parties because they had obtained the consent decree, which remained in effect. The City thereupon

moved to vacate the consent decree under Fed. R. Civ. P. 60(b)(5). The district court granted that motion and denied the petitions for attorney's fees. See Pet. App. 136-38.

Petitioners' motion for reconsideration was granted in part. The district court refused to vacate the consent decree but modified it slightly and vacated the order denying attorney's fees. Pet. App. 140-41. The consent decree, in its modified form, still required the City to pay judgments in the order that they are entered (Pet. App. 101, § IV, ¶ 5); annually to submit to the City Council a request for appropriation of monies sufficient to cover the full anticipated liability for the ensuing year, which may not be less than the total amount of judgments that became final in the preceding year (Pet. App. 102, § IV, ¶ 9); and to follow specified detailed procedures for authorization and payment of judgments (Pet. App. 103, § IV, ¶¶ 10-14). The City was also required to pay judgments within 45 days after the presentment of proper documentation. Pet. App. 103, § IV, ¶ 11(d). The only change the district court made in light of *Evans II* was to add a clause to the decree providing that judgments under $1000 need not be paid in any particular order. Pet. App. 140.

On the City's appeal, a divided panel of the court of appeals affirmed. Pet. App. 24-50. This decision was vacated when the case was set for rehearing en banc. Pet. App. 133. The en banc court of appeals then reversed. Pet. App. 1-23 (*Evans III*). A five-judge plurality held that the consent decree must be vacated because no federal interest remained after *Evans II* for the decree to protect. Pet. App. 1-17. Judge Ripple concurred in the judgment, writing simply that *Evans II* had so changed the prevailing law that continued enforcement of the decree was improper under *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992). Pet. App. 17-18. Judge Cudahy, joined by

Judges Cummings and Rovner, dissented, arguing that a sufficient federal interest remained in enforcing the Constitution, especially the colorable due process claim, against the City's payment practices. Pet. App. 18-22. Judge Flaum, joined by Judge Kanne, also dissented, arguing that, in light of a colorable due process claim, there was no legal or factual change in circumstances that justified setting aside the consent decree. Pet. App. 22.

ARGUMENT

THIS CASE PRESENTS ONLY QUESTIONS OF THE APPLICATION OF WELL-SETTLED LAW WITHIN A UNIQUE FACTUAL CONTEXT.

A majority of the court of appeals in this case resolved two propositions, neither of which merits this Court's attention. The first is that a federal court should not exercise its equitable powers to enjoin operations of local government unless there is a substantial claim of a federally recognized wrong to be remedied. The second is that *Evans II* so changed the law that any claim of a federally cognizable injury in this case was illusory. Neither proposition is the subject of a split of authority in the courts of appeals. Petitioners do not even claim such a conflict. Neither presents an issue of great importance that this Court has not previously addressed. Indeed, this Court in *Rufo* only recently addressed the standard for amending or vacating a consent decree under Fed. R. Civ. P. 60(b)(5). Both propositions are well supported by this Court's precedents and involve application of well-settled rules of law to the unique—indeed almost bizarre—procedural history of this case. Thus the holding below was simply that, in the context of the extraordinary litigation in this case, Rule 60(b)(5) mandated vacatur of a consent decree entered nearly ten years ago. This decision does not warrant plenary review.

1. Petitioners do not appear to argue that a federal consent decree could be entered in the first instance with-

out a showing that some nontrivial federal interest exists. Nor do they argue directly that a federal decree should continue in force after the claimed federal interest is shown to be without substance. Yet that is exactly the result of what they advocate. If a consent decree is treated solely as a contract, as petitioners implicitly submit, then "a deal is a deal." Pet. App. 18 (Cudahy, J., dissenting). But if a consent decree is recognized as an ongoing judicial act, it should not outlive the law it is meant to enforce.

Petitioners rely on the contractual aspects of consent decrees to argue that it is improper to allow reconsideration of the legal basis for a consent decree once the decree has been entered. Evans Pet. 12-17; Balark Pet. 22-26. But this line of argument runs into direct conflict with the decisions of this Court holding that consent decrees are not simply contracts; they are also equitable decrees of a federal court and should not be enforced simply because the defendant has previously consented. See *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (A "federal court is more than a 'recorder' of contracts' from whom parties can purchase injunctions."); *System Federation No. 91, Railway Employes' Department v. Wright*, 364 U.S. 642, 651 (1961) ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act."). See also *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846-47 (5th Cir. 1993), cert. denied, 114 S. Ct. 878 (1994).

Indeed, the court reaffirmed this understanding in the case on which petitioners primarily rely, *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992). The defendants there had agreed to a decree forbidding double celling at the jail prior to the decision in *Bell v. Wolfish*,

441 U.S. 520 (1979), which held that the Constitution does not forbid double celling. Relying on *System Federation*, the Court observed that an intervening change in law is a sufficient ground for relief from a decree despite the defendants' prior consent. See 112 S. Ct. at 762-63. The court concluded that if the defendants "could establish on remand that the parties to the consent decree believed that single celling of pretrial detainees was mandated by the Constitution, this misunderstanding of the law could form a basis for modification." *Id.* at 763. Thus a defendant's prior consent does not immunize a decree from review as the law subsequently evolves.

Decrees, whether entered by consent or otherwise, are still judicial acts. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) (" '[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree.") (quoting *System Federation*, 364 U.S. at 651); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (referring to the well-established rule that federal "judicial powers may be exercised only on the basis of a constitutional violation" (citation omitted)). Thus, without some violation of federal law to remedy, there can be no exercise of federal judicial power, even if all parties consent. Even Judge Cudahy, in his dissent below, recognized that "[w]hile the Supreme Court has yet to vacate a consent decree on the grounds that there is an insufficient federal interest, it has suggested that the Constitution implictly imposes such a limitation on the equitable powers of the federal courts." Pet. App. 20. Thus, the contractual consent of the parties does not confer on a federal court the power to supervise state and local governments even when unnecessary to safeguard federal rights.[1]

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[1] The plurality below also notes that entry into litigation cannot give the parties greater powers than they otherwise enjoy. That is, the existence of a lawsuit against a municipality cannot give the municipality's chief executive more power than he or she otherwise

Moreover, even if there were some shred of a federal interest left to protect after the governing law changed in *Evans II*, the decision below would still be proper under Fed. R. Civ. P. 60(b)(5) as interpreted by this Court in *Rufo*. See Pet. App. 17-18 (*Evans III*, Ripple, J., concurring). Petitioners do not argue that *Evans II* did not require some change in the consent decree at issue here.[2] As the court of appeals concluded, absent the later discredited decision in *Evans I*, the City would have agreed to no aspect of the consent decree. See Pet. App. 6-7. Plainly this is correct; prior to *Evans I* the City had refused to settle and had defended on the merits. And relief under Rule 60 must "resolve the problems created by the change in circumstances." *Rufo*, 112 S. Ct. at

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had to make City policy. See Pet. App. 7-8. Although Balark attempts to exploit this dictum (Pet. 22-24), the outcome of this case is not dependent on the change in administrations between the time the consent decree was entered and the time it was vacated. Thus, the decision below does not rest on the proposition that one mayoral administration cannot bind later administrations to the terms of a consent decree. Given the change in the law underlying the consent decree, even the administration that entered the decree, were it still in power, would have been entitled to relief under Fed. R. Civ. P. 60(b)(5).

[2] Petitioners argue only that the court below erred by not "tailoring" the consent decree to conform to the change in the law. Evans Pet. 23-25; Balark Pet. 18-20. This argument misses the point. The change in the law eliminated the purpose for any decree with any terms whatever. There is now no basis for any exercise of federal power in this case. With the vacatur, the decree perfectly reflects this change in the law.

Evans further faults the Seventh Circuit for not requiring the City to show extreme and unexpected hardship before vacating the decree. Pet. 17-19. This argument is simply inapplicable to vacatur for a change in the law; it properly applies only to change in facts. *Rufo* rejected the argument that Rule 60 requires a showing that a consent decree works a "grievous wrong" before relief from it is appropriate. See 112 S. Ct. at 757-60. In this case the law has changed so greatly that there is no law for this decree to enforce. There is thus no need to require a showing of hardship from continued enforcement of a decree that ought not to be enforced at all.

764. *Evans II*, as interpreted in *Evans II* by the court that had rendered that decision, eliminated any claim that there is any federal role whatever in oversight of the speed with which units of local government satisfy their judgments.[3] In light of that change in the law, the standards of Fed. R. Civ. P. 60(b)(5) and *Rufo* make plain that vacatur was correct. Indeed, when the district court tried to modify the decree to reflect the falling away of the equal protection claim, the court could not do so. The court had to add an entirely new provision that nothing forbade the City to give small judgments preferential treatment. Even that modification had no practical significance. The decree still required the City to pay all judgments in order and within 45 days. As the court below held, *Evans I* had a greater impact than merely forbidding any quicker payment of small judgments. Thus

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[3] Balark argues (Pet. 15-16, 21) that, in interpreting its own decision in *Evans II*, the court below violated 28 U.S.C. § 2106. This issue is both waived and uncertworthy. The Section 2106 issue is raised for the first time in the petition for certiorari, and Balark has shown no reason for her failure to raise it in the Seventh Circuit. It was entirely evident from the City's opening brief to that court that we were arguing that *Evans II* had affected both the due process and equal protection claim. Yet Balark's brief never cited Section 2106. Moreover, this is not an issue on which the lower courts have split or upon which this Court's guidance is required. Balark does not contend that the federal courts cannot tell dictum from holding.

Balark's position in any event is meritless. While no due process claim was before the court in *Evans II*, that decision's reasoning applied as powerfully to petitioners' due process theories as to their equal protection theories. And the only reason *Evans II* did not directly consider due process was that petitioners did not advance it as an alternative ground for affirmance of their judgment. Moreover, Balark's position that the *Evans III* court could not consider whether petitioners due process theories had enough merit to support the decree leads to an unacceptable result. If Balark is right that consent decree obligors cannot later litigate the legal theories on which a consent decree is based, obligors will have absolutely no opportunity to seek relief from a decree on the basis of a change in the law. Yet such relief is clearly authorized by Fed. R. Civ. P. 60(b)(5).

the repudiation of *Evans I* in *Evans II* required broader relief.

Rufo also teaches that in assessing the propriety of relief under Rule 60, a court should consider the public interest in restoring control over local government to the people's elected representatives. Accord *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991). Thus if the court below correctly concluded that petitioners' due process theory lacked substance (and neither petition quarrels with that conclusion), there is no justification for preserving a federal district court's control over municipal taxing and spending in order to protect these nonexistent due process rights.[4]

Thus, there appears to be no disagreement—by the dissenters or petitioners—about the governing legal principles here. The only issue is whether those principles were correctly applied to the unique facts of this case. Thus, the point separating the plurality and the concurrence from the two dissents is whether, on these facts, the unlitigated due process claim was colorable enough and enough of a basis for the consent decree to support that decree after the equal protection claim was so roundly denounced. But neither petition even argues that the due

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[4] There is in fact no merit to the due process claim. Considered as a substantive due process claim, the contention that delays in paying judgments are unconstitutional because time erodes their value is no different from a claim that a post-judgment interest statute providing for a below-market rate is unconstitutional. As the court below correctly noted, such a claim is frivolous. See Pet. App. 14-16. Likely for this reason, petitioners, as well as the *Evans I* court and the dissenters below, characterized the claim as a procedural one. But the claim is no stronger that way. The decision to delay payment for budgetary reasons was made legislatively—when the Chicago City Council appropriated funds to pay judgments in its annual appropriation ordinance. Decisions since *Evans I* make clear that such legislative action satisfies due process when across-the-board determinations governing many cases must be made. See *Atkins v. Parker*, 472 U.S. 115, 129-31 (1985); *United States v. Locke*, 471 U.S. 84, 108 (1985).

process claim has merit. And although much of Evans' petition is devoted to complaining about how the lower federal courts have interpreted this Court's decision in *Rufo* (see Pet. 8-11), the petition fails to show how this case represents a misapplication of *Rufo*.[5] Indeed, the petition fails to show that any of the cited cases has misapplied *Rufo*. See Pet. 10. It seems that Evans' real complaint is not with the interpretation given *Rufo* by the Seventh Circuit or other courts, but with *Rufo* itself. See Pet. 10-11, 13-15.

Petitioners raise the specter that hundreds of consent decree obligors will rush to the courthouse seeking to vacate decrees because the Seventh Circuit's opinion in this case makes it seem so easy. Evans Pet. 8-11; Balark Pet. 26-27. Even a cursory look at this opinion and the litigation leading up to it shows how ludicrous this suggestion is. The City litigated the merits of petitioners' constitutional claims to the Seventh Circuit and lost in *Evans I*. The district judge then applied heavy pressure to the City to enter a decree based on what "the Court of Appeals ordered done a long time ago." Pet. App. 6 (quoting district court). Almost five years later, the Seventh Circuit reversed itself in *Evans II*. But even after that, the district court refused to vacate the consent

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[5] Evans misrepresents the proceedings in the district court in an effort to show that this case misapplied *Rufo*. The petition notes the evidentiary hearings at which the district court took testimony about what motivated the City to enter the consent decree. See Pet. 15. The district court itself, however, later agreed that all this evidence was irrelevant because the interpretation of the consent decree should be based, just as petitioners urge (Pet. 14, 16) on its four corners. See Pet. App. 61-62. No judge at any time in this litigation has ultimately held that subjective motivation is relevant under Fed. R. Civ. P. 60(b)(5). This point disposes as well of Evans' claim that the Seventh Circuit found facts. Pet. 27-30. Evans claims that the plurality determined the motivation of the City for entering the decree. But that court made no inquiry at all into what was in the minds of City officials in entering the decree. The only inquiry was into the state of the law and the posture of the case at the time of the decree.

decree, and the City lost its appeal before the panel. Only after obtaining rehearing en banc did the City prevail, and then only by the fewest possible number of judges in two separate opinions. Thus all the court below has held is that an outright repudiation by the court of appeals of the very decision that forced settlement in the first place is a sufficient basis to vacate a decree. Surely such a limited holding will cause no stampede to the courthouse. And, in any event, those consent decrees that are based on bygone legal theories should be modified or vacated. Federal Rule of Civil Procedure 60(b)(5) and *Rufo* provide for just that.

In this respect, the decision below is perfectly in accord with *System Federation,* which neither of the petitions in this case even mentions, although it was a centerpiece of the plurality's opinion. See Pet. App. 7, 9. In *System Federation,* a consent decree was entered that forbade the Railroad from discriminating against employees who refused to join a union. See 346 U.S. at 644. After the consent decree had been in place for several years, federal law was changed to allow a union shop. *Ibid.* This subsequent legal change could not, of course, affect the legal basis of the consent decree at the time the decree was entered. Had the decree been nothing more than a binding agreement based on the exchange of consideration, there would have been no basis for reforming the decree after Congress changed the law. As the lower courts in that case noted, there was nothing under the new law that prohibited the measures dictated by the consent decree. See *id.* at 646. Nonetheless, this Court held that the change in the law was sufficient to require modification of the decree. As this Court recognized as recently as *Rufo,* the reasoning of *System Federation* still holds: if federal law has changed, then the federal courts ought not to continue to exert their power to protect federal interests that no longer exist. The court below faithfully implemented this rule in this case. The plurality and the concurring judge determined that the decree was entirely based on *Evans II* and therefore had to be vacated.

This narrow, fact-bound, correct decision does not merit review.

2. The real issue in this case is whether litigants who ultimately lose on all questions of law may nonetheless keep the benefits of a consent decree entered on the basis of an interlocutory victory. For there is no other basis on which petitioners could possibly hope to keep the consent decree in place. Not a single judge who has heard this case in *Evans II* or since then has been willing to hold that any clause of the Fourteenth Amendment actually requires that units of local government satisfy judgments against them within any particular time frame. Even the dissenters below would go no further than describing the due process claim as "at least colorable." Pet. App. 21 (Cudahy, J., dissenting); see Pet. App. 22 ("a colorable due process theory supported at least part of this decree when it was entered") (Flaum, J., dissenting).[6] And petitioners, although decrying the loss of the consent decree (and thus their attorney's fees), nowhere argue that the City's payment practices ever violated the Constitution or that there is any risk that the City would return to its prior practices unless restrained by the consent decree.

These gaps in petitioners' argument leave a consent decree that simply could not have been agreed to by the parties had it been proposed after *Evans II* and that could not have been entered by the district court even if

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[6] Balark complains that the Seventh Circuit has created a new test for determining whether a consent decree is supportable: whether there is a "substantial" federal interest,, rather than whether there is a "colorable" claim. But Balark herself admits that the precise standard under the decision below is "undefined." Pet. 25. There is no indication in the opinions below that this is anything more than semantics. It is more than evident from the plurality opinion that there was no semblance of a federal issue in the aftermath of *Evans II*. This Court need not use its resources to decide whether "substantial" means more than "colorable" in a case in which the difference if any is plainly irrelevant to the outcome of the case.

the parties had agreed. See *League of United Latin American Citizens v. Clements*, 999 F.2d at 845-46. The issue here is whether that unadjudicated theory can support this consent decree when it is a certainty that they would not prevail on the merits.[7] The court below acted properly and in harmony with the decisions of this Court in vacating the decree that required an ongoing exertion of federal power in support of a theory that simply is not the law. That decision does not conflict with the decision of any other circuit or with any decision of this Court. Nor could it. We are aware of no other case in which the change in the law relied on for application of Fed. R. Civ. P. 60(b)(5) was a reversal of an interlocutory decision by the same court in the same litigation. This chain of events is unlikely ever to recur. Thus, further review in this case would prove of little help to the lower courts in their consideration of other cases.

At the heart of this case is the assessment of the effect of *Evans II* on this case. The Seventh Circuit is in far

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[7] Evans' argument about pendent jurisdiction (Pet. 20-23) fails for two reasons. First, it is waived: the state law claims were not raised as grounds for relief separate from the constitutional claims in the complaint. See Pet. App. 96, ¶ 2; Pet. App. 98, ¶ 9. Rather, the state law issues were raised only to show the existence of a federally protected property interest. Second, there can be no pendent jurisdiction where the federal claims are insubstantial. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Here, the court below correctly held that the federal claims are not even colorable, and petitioners do not even argue that they would prevail on any federal claim if the issues were to go to trial today. Thus, if this case were brought today, any pendent state law claim would be dismissed.

In any event, if Evans wants a ruling on her state law claims, she is not precluded by the Seventh Circuit's judgment from asking the district court for one. All that court held is that the consent decree must be vacated. It does not in terms terminate this litigation, although dictum in the plurality opinion certainly indicates a hope that that will be the result. Of course, that state law claim is by definition not certworthy.

the best position to determine, as it did in the decision below, what it meant by its opinion in that case and how far it meant to go in overturning its decision in *Evans I*. This Court was asked to review *Evans II*, but declined, 495 U.S. 956, and for good reason. This Court's redetermination of the issues in that case would have been of extremely limited utility to other courts. Nothing more is at stake here. All that the court below decided was what the court meant by its own opinion in *Evans II*, and it then applied settled law to the case as so viewed. This Court need not give guidance to other circuits on that issue.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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